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THE PARDONING POWER IN THE AMERICAN STATES

A DISSERTATION

SUBMITTED TO THE FACULTY
OF THE GRADUATE SCHOOL OF ARTS AND LITERATURE
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

BY

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THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILLINOIS
1922

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Published June 1922

Composed and Printed By
The University of Chicago Press
Chicago, Illinois, U.S.A.

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PREFACE

The exercise of the clemency power offers an excellent illustration of the use of administrative discretion. Because of limited constitutional and statutory regulation the practices which have developed in the administration of clemency in the American states are numerous and varied in character. The purpose of this study is to examine and criticize the organization and methods of operation of clemency authorities.

The scope of clemency is so broad that it has been necessary to confine this investigation to a limited field. An examination of the administration of clemency in the national government has therefore been left untouched. For the same reason this study does not deal with the pardoning power of mayors and other local officials in those cases where the exercise of this power for minor offenses has been vested in them.

No attempt has been made to deal with the subject of clemency from the standpoint of the sociologist and criminologist. This field of investigation, although of vital importance, lies outside the scope of this study which is limited to an examination of the administration of this power.

Valuable assistance and encouragement in this undertaking have been received from Professors Ernst Freund, C. E. Merriam, and Mr. W. F. Dodd. I am also much indebted to pardoning officials of several states for their kindness in furnishing information.

C. J.

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POLITICAL SCIENCE

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CHAPTER I

INTRODUCTORY: THE PARDONING POWER IN THE AMERICAN COLONIES

The principle of clemency as developed in the English governmental system and transmitted to America had its probable origin in the early tribal life of the Teutonic peoples. Its application at this early date was extremely vague and uncertain because of many counteracting influences. The existence of the right of private vengeance and retaliation, the wergeld, and the blood feud offset its use. Added to this was the weakness of the royal power which was often nullified by powerful nobles.

This condition was typical of the different areas of England during the early Saxon rule. Coupled with this was the absence of a system of national jurisprudence, and no clear demarcation between public and private wrongs. As a result the kings attempted to apply clemency to those offenses only which were committed by members of their own household, or to offenses which threatened their royal power and authority.

The idea of clemency seems to have been loosely recognized in the laws of Aethelbert of Kent, of Alfred, and in the collections of Edward the Confessor. The royal prerogative was greatly strengthened through the conquest of England by the Normans. William the Conqueror brought from Normandy the view that clemency was an exclusive privilege of the king. But in practice he was compelled to acknowledge the limitations of this theory. The church was able through its strong power to develop its system of canon law and to claim the exemption of the clergy, in criminal matters, from the king's jurisdiction. This "benefit of clergy" operated to lessen the monarch's complete power in matters of clemency. The granting of power to the county palatines had a like effect.

During this early period Glanville and Bracton had occasion to refer to the clemency power and the latter indicated some royal limitations by declaring:

> But in all the aforesaid cases, whatever may have been the cause, when the outlawry has been made duly and according to the law of the land, a person is not restored except to the king's peace alone, that he may go and return and

contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace.[1]

During the period marked by the ascendancy of Parliament from the later Plantagenets to the Tudors, Parliament, on different occasions, made efforts to regulate or curtail the administration of royal clemency.[2] With the centralization of power under the Tudors it was not surprising that Henry VIII should aim at the possession of the exclusive exercise of this power. This was accomplished by the passage of the act of 27 Henry VIII, c. 24, which provided that complete authority to grant clemency should be vested in the crown. This process of maintaining unimpaired the royal power to grant clemency continued under the Tudors and the Stuarts. But with it went an attempt more clearly to define and describe its exercise and use.

Lord Bacon was of the opinion that the rigidity of the law could be partially corrected through the judiciary instead of appealing to the monarch to extend mercy. In his essay "Of Judicature" he advises the judges as follows:

> Judges must beware of hard constructions, and strained inferences; for there is no worse torture than the torture of laws; especially in the case of laws penal, they ought to have care that that which was meant for terror be not turned into rigor . . . . therefore let penal laws if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution. . . . . In cases of life and death, judges ought (as far as the law permitteth) in justice to remember mercy, and to cast a severe eye upon the example, but a merciful eye upon the person.[3]

Coke defined more accurately the nature of clemency and its true relationship to the royal prerogative.[4] A number of other writers, both legal and philosophical, such as Thomas Hobbes,[5] Sir Mathew Hale,[6] Chief Justice Holt, Sir William Hawkins,[7] Sir Michael Foster,[8] and

[1] Bracton (Twiss's translation, II, 371).

[2] 2 Edward III, c. 2; 5 Edward III, c. 12; 13 Richard II, c. 1.

[3] *Bacon's Essays*, edited by Joseph Devey, pp. 283–84.

[4] Coke, *Institutes*, chap. 105, "Of Pardons."

[5] *De Cive*, chap. iii; *Leviathon*, p. 182.

[6] *Historia Placitorum Coronae.* [7] *A Treatise of the Pleas of the Crown.*

[8] *A Discourse on High Treason*, 9 (Crown Cases).

William Eden,[1] dealt with different aspects of clemency and attempted to explain its true characteristics and its proper exercise and use by the monarch.

But in spite of these influences the severity of the English criminal law was increased until in 1769 Sir William Blackstone was led to say:

> Yet, though . . . . we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found there in, inflicted (perhaps inattentively) by a multitude of successive independent statutes upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than a hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one-half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt to relieve his wants or supply his vices, and if, unexpectedly, the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity has taught him to contemn.[2]

Yet Blackstone believed that it was one of the merits of the English form of government that it provided a method for modifying such a harsh and severe condition, for he said:

> This is indeed one of the great advantages of monarchy in general above any other form of government: that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved; holding a court of equity in his own breast to soften the rigor of the general law in such criminal cases as merit an exemption from punishment. . . . . To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince.[3]

When the American colonies were founded the English legal conceptions of the seventeenth and eighteenth centuries were transplanted to the new world. Included in these was the principle of clemency for

[1] *Principles of Penal Law.*

[2] Blackstone, *Commentaries*, Book IV, p. 18. [3] *Ibid.*, pp. 397–98.

criminal offenders.[1] And in most of the colonial charters the king delegated the pardon power and made provisions for its exercise.

In the first Virginia charter of 1606 no mention occurs regarding this power, but in the second charter in 1609 there is granted

> unto the said Treasurer and Company, and their Successors, and to such Governors, Officers, and Ministers, as shall be by our Council constituted full and Absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us, ... as shall from Time to Time adventure themselves in any Voyage thither . . . . as well in Cases capital and criminal, as civil, both Marine and other; So always as the said Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of England.[2]

The third Virginia charter obtained in 1912 contained no reference to the pardon power. When this charter was annulled by writ of *quo warranto* in 1624 Virginia became a royal colony and the pardon power from then on to the Revolution was exercised by the royal governor.

The charter granted in 1620 to the Council for New England[3] was similar to the second Virginia charter in respect to clemency. This power was granted to the Council and to such governors, officers, and ministers as might be constituted by the Council. The Council for New England failed in its colonizing plans and therefore had little need for this power. But when the Massachusetts Bay Colony received its charter[4] in 1629 it contained a grant of the pardon power to the governor and company and their officers which was absolute if not repugnant to the laws and statutes of the realm of England. The Massachusetts Body of Liberties adopted by the General Court in 1641 contained a provision that the governor and deputy governor by joint consent, or any three assistants concurring in consent, should have power out of court to reprieve a condemned criminal until the next quarter or General Court, but this latter body only should have power to pardon a condemned criminal.[5]

In 1684 the Massachusetts Bay charter was annulled by a writ of *quo warranto* and when a commission was issued to Sir Edmund Andros on April 7, 1688, for the governing of the Dominion of New England it conferred upon him the power to pardon offenders in capital and criminal matters and to remit fines and forfeitures. Only in cases of treason

[1] *United States* v. *Wilson*, 7 Pet. 150; *McDowell* v. *Couch*, 6 La. Ann. 365.

[2] Thorpe, *Charters and Constitutions*, VII, 3800–3801.

[3] *Ibid.*, III, 1833.

[4] *Ibid.*, III, 1858.

[5] Massachusetts Body of Liberties, section 72.

and wilful murder was he forbidden the use of this power, but in such cases upon "extraordinary occasions" he could grant reprieves to the offenders until the intent of the king's pleasure could be ascertained.[1] The new charter granted to Massachusetts Bay in 1691 contained no reference to the clemency power but the governor appointed by the king exercised it as the direct representative of the monarch.

When Maryland was founded a charter was granted to Baron Baltimore and his heirs which authorized them "to Remit, Release, Pardon, and Abolish, all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed."[2] The proprietors continued to exercise this power down to the Revolution with the exception of the period from 1690 to 1715 during which Maryland was a royal colony.

In 1639 Sir Ferdinando Gorges obtained a grant of the province of Maine and full authority was given unto him and his successors to pardon, remit, and release all offenses and offenders against any of the laws or ordinances within the said province.[3] In 1677 Maine was bought by the Massachusetts Bay Company and became incorporated into that colony. It remained a part of Massachusetts until 1820.

Although settled for some years previously Connecticut did not receive a charter until 1662. This charter provided that the General Assembly, or the major part thereof, under their common seal could release or pardon offenders if the governor and six of the assistants were present in such assembly or court.[4] The charter granted to Rhode Island and Providence Plantations in 1663 was very similar to that of Connecticut in this respect.[5]

The Carolinas received their first charter in 1663. The lord proprietors were given authority to remit, release, pardon, and abolish, whether before judgment or after, all crimes and offenses of every character against the laws of the colony.[6] In the meantime settlers had drifted into Carolina and so in 1665 the proprietors granted them a government through an instrument known as "Concessions and Agreements of the Lord Proprietors of the Province of Carolina." This document provided that the governor and council, after condemnation, could reprieve a case for cause until the case with a copy of the whole trial proceedings could be presented to the proprietors who would pardon or command execution of the sentence.

[1] Thorpe, *Charters, etc.*, III, 1866.

[2] *Ibid.*, III, 1680.

[3] *Ibid.*, III, 1629.

[4] *Ibid.*, I, 533–34.

[5] *Ibid.*, VI, 3215.

[6] *Ibid.*, V, 2746.

A new charter was granted to the lord proprietors in 1665 in which the pardon power remained as it was in the first charter.[1] When the fantastic scheme of government framed by John Locke, and known as the Fundamental Constitutions of Carolina, 1669, was prepared for the colonists it contained a provision, Article 33, that "The palatine's court shall consist of the palatine and seven proprietors, wherein nothing shall be acted without the presence and consent of the palatine or his deputy, and three other of the proprietors or their deputies. This court shall have power . . . . to pardon all offences."[2] The proprietors' courts were authorized to "mitigate all fines and suspend all execution in criminal causes, either before or after sentence, in any of the other inferior courts respectively."[3] This pretentious form of government was ill adapted to a frontier community and was never put into operation. When the Carolinas became royal colonies the pardon power became lodged in the hands of the royal governors.

In 1664, the year that New York was granted to the Duke of York, he transferred to Lord John Berkeley and Sir George Carteret that part of his domain which now comprises New Jersey. These proprietors set up a government in the same year known as "The Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with all and Every the Adventurers and all Such as shall Settle or Plant There." In this government the governor and his council were allowed after condemnation to issue reprieves until the case should be presented with a copy of the entire trial proceedings to the proprietors who would either pardon or command the execution of the sentence. In the meantime the offender was to be kept in safe custody.[4] The similarity of this provision regarding clemency with that in the government granted by the proprietors in the Carolinas is very evident.

In time the proprietors divided their holdings and Berkeley sold his share, the western part, to William Penn and other Quakers. In 1676 was drawn up the "Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of New Jersey, in America." These concessions which were the fundamental rights of this province contain a curious example of Quaker legislation regarding clemency. The provision was to the effect that any person who should prosecute or prefer any indictment or information against others for any personal injuries or other criminal matter or cause (treason, murder, and felony

[1] Thorpe, *Charters, etc.*, V, 2764.

[2] *Ibid.*, V, 2776 (Art. 33).

[3] *Ibid.*, V, 2778 (Art. 47).

[4] *Ibid.*, V, 2540.

only excepted) should be "master of his own process, and have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgment, and condemnation, and pardon and remit the sentence, fine and imprisonment of the person or persons offending, be it personal or other whatsoever."[1]

On August 6, 1680, the Duke of York made a second grant for both the land and government of West Jersey to William Penn and five other persons. In this grant was included the power of granting pardons and other forms of clemency.[2] Likewise in a confirmation of March 14, 1682, to twenty-four proprietors in East Jersey, the Duke of York granted the pardoning power to these proprietors.[3] In the following year they set up a government known as the Fundamental Constitutions for the Province of East New Jersey which provided that the power of pardoning should never be made use of but by the consent of eighteen of the proprietors or their proxies. But the governor, in connection with four proprietors who, at the time, were to be judges of the Court of Appeals, could reprieve any person after the day of execution had been set, but not to exceed one month.[4] In 1702 the proprietors of East and West Jersey surrendered their "pretended right of Government" to her majesty and from then on the exercise of clemency was vested in the royal governor.

Any reference to the clemency power in New Hampshire during the colonial period is extremely meager. The only one seems to be in the "Commission of John Cutt, etc., constituting a President and Councell for New Hampshire, 1680," and which provides that in all criminal cases where the punishment extends to the loss of life or limb, wilful murder only excepted, the person convicted shall either be sent to England with a statement of his case, or execution of sentence shall be respited until the case can be reported to the Privy Council and a decision reached.[5] When New Hampshire became a royal colony the pardon power was vested in the same governmental authority as in other royal colonies.

In 1681 William Penn received from Charles II a charter for the province of Pennsylvania. Included in this grant was a delegation to the proprietor and his heirs of full power to remit, release, pardon, and abolish, whether before judgment or after, all crimes and offenses with the exception of treason and wilful and malicious murder. In these

[1] Thorpe, *Charters, etc.*, V, 2551 (chap. xxi).

[2] *Ibid.*, V, 2563–64.

[3] *Ibid.*, V, 2573.

[4] *Ibid.*, V, 2578.

[5] *Ibid.*, IV, 2448.

instances they were empowered to grant reprieves until the royal will could be determined.[1] From then until the Revolution it appears that the granting of clemency was placed in the hands of the Executive Council of the province. Since Delaware was acquired by Penn in 1682 the same plan for administering clemency was in force there as in Pennsylvania.

The Georgia charter granted in 1732 conferred authority upon the corporation to "sell, impose, and inflict reasonable pains and penalties upon offenders, and to mitigate the same as they or the major part of them present shall see requisite."[2] When Georgia became a royal colony this power with all others reverted to the crown.

In the settlement of the English continental colonies the royal prerogative to grant clemency was delegated without reservation except in three instances. When William Penn received his charter in 1681 the proprietor, under its terms, could pardon in all cases except for treason and wilful murder, and in these he could reprieve until the royal will could be ascertained. An identical provision occurs in the commission which Edmund Andros received to govern the dominion of New England in 1688. The provisions in the case of New Hampshire were of such a character that the criminal either was to be sent to England or a respite granted until the case could be reported to the Privy Council.

It seems quite clear from an examination of the colonial charters that the crown delegated the pardoning power in the colonies, that it was lodged in the hands of the executive authority, with the assistants associated sometimes, and that slight provision existed for royal intervention except in the royal colonies where the governor was subject to royal instructions. This was the basis upon which was organized the administration of clemency in the American states.

[1] Thorpe, *Charters, etc.*, V, 3038.

[2] *Ibid.*, II, 770.

CHAPTER II

STATE ORGANIZATION OF THE PARDONING POWER

With the outbreak of the American Revolution colonial governments quickly disappeared and were succeeded by new state governments. As the executive had usually exercised the power of clemency in the colonies it would have been natural to intrust the same power to the new state executives.[1] Yet, as Jefferson remarked:

> By executive powers we mean no reference to those powers exercised under our former government by the crown as its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the governor. We give him those powers only, which are necessary to execute the laws (and administer the government) and which are not in their nature either legislative or judiciary. The application of this idea must be left to reason.[2]

But at this time the executive department in the state governments had not yet gained the confidence of the people. It brought remembrances of royal governors and their opposition to colonial rights. The legislature, particularly the lower house, had been the champion of the people in colonial days. It was to be expected, therefore, that most powers of government would be concentrated in the legislature.

The governor was universally elected by the legislature, and, except in South Carolina and Delaware, his term of office was restricted to one year. In addition, in the six southern states, restrictions were placed upon his eligibility for reelection. In every state there was an executive council, chosen except in New Jersey by the legislature, which the governor was required to consult on all important matters, and which in most cases incidentally served

[1] "The fact that the pardoning power necessarily originated with the sovereign power, and that the rulers were considered the sovereigns, is the reason why, when jurists came to treat of the subject, they invariably presented it as an attribute indelibly inhering in the crown. The monarch alone was considered the indisputable dispenser of pardon; and this again is the historical reason why we have always granted the pardoning privilege to the chief executive; because he stands, if any one visibly does, in the place of the monarch of other nations; forgetting that the monarch has the pardoning power, not because he is the chief executive, but because he was considered the sovereign—the self-sufficient power from which all others flow; while with us the governor or president has but a delegated power, and limited sphere of action, which by no means implies that we must necessarily or naturally delegate, along with the executive power, also the pardoning authority."—Lieber, *Civil Liberty and Self-Government*, II, 147.

[2] *Notes on Virginia*, Appendix II.

to restrict such powers of appointment and pardon as he might possess. In New Jersey the upper branch of the legislature, the legislative council as it was called, served as an executive council.[1]

It is not surprising, therefore, to discover that in New Hampshire, Massachusetts, New Jersey, Pennsylvania, and Virginia the pardoning power could be exercised only by the governor with the consent of the executive council.[2] Vermont, although not one of the original states, provided likewise in its constitution of 1777 for the exercise of the pardon authority by the governor and the executive council.[3] Rhode Island and Connecticut made no changes in the administration of clemency and retained their charter form of government for some years. Georgia was even more watchful and granted power to the governor merely to "reprieve a criminal or suspend a fine until the meeting of the assembly, who may determine therein as they shall judge fit."[4] Only in the states of New York, Delaware, Maryland, North Carolina, and South Carolina was the pardon authority vested in the governor alone.

As a result of state constitutional development a tendency soon manifested itself in the direction of abolishing the executive council and increasing the powers of the governor. This tendency resulted in the enlargement of the governor's control of clemency in some of the states which had previously shared it with the executive council or the legislature. In 1789 Georgia vested it in the hands of the governor.[5] This was also done by Pennsylvania in 1790[6] and by Virginia much later in 1850.[7]

The idea that the proper depository of clemency was the executive department gained ground rapidly. This was particularly true in the minds of the constitution makers of new states. Of the thirty-five non-original states the constitutions of twenty-six, at the time of their admission into the Union, vested the pardoning power in the hands of the governor. Of the remaining nine states, Vermont, in 1777, and Maine, in 1819, placed it in the hands of the governor and executive council; Louisiana (1812) in the hands of the governor and senate;

[1] Holcombe, *State Government in the United States*, p. 54.

[2] Constitutions of New Hampshire, 1784; Massachusetts, 1780, Part II, chap. ii, Sec. 1, Art. 8; New Jersey, 1776, Part IX; Pennsylvania, 1776, sec. 20; Virginia, 1776.

[3] Constitution of Vermont, 1777, chap. ii, sec. 18.

[4] Constitution of Georgia, 1777, Art. 19.

[5] Constitution of Georgia, 1789, Art. 2, sec. 7.

[6] Constitution of Pennsylvania, 1790, Art. 2, sec. 9.

[7] Constitution of Virginia, 1850, Art. 5, sec. 5.

Montana (1889) and South Dakota (1889) associated a board with the governor in its exercise; and Minnesota (1858), Nevada (1864), Idaho (1890), and Utah (1896) created boards of pardon.

Of the thirteen original states only New Hampshire has retained intact its original organization for the administration of clemency. Because of increased duties assigned to the governor, an increase in applications for clemency by reason of enlarged prison populations, and a feeling in a number of states that the clemency power had not been wisely administered by the governor, a large number of states within the last quarter of a century have, either through constitutional or statutory provision, established advisory pardon boards for the purpose of advising or even restraining the governor in the use of this power.

A summary of the original organization of the pardoning authority in each state with subsequent changes in organization is indicated in the following table:

ORGANIZATION OF PARDON AUTHORITIES

Alabama—
- Constitution (1819), governor
- Constitution (1901), governor and advisory board

Arizona—
- Constitution (1910), governor
- Statute (1913), governor and advisory board

Arkansas—
- Constitution (1836), governor

California—
- Constitution (1849), governor
- Statute (1915), advisory board created

Colorado—
- Constitution (1876), governor
- Statute (1895), advisory board created

Connecticut—
- Charter (1662) and Constitution (1818), governor and General Assembly
- Statute (1902), pardon board

Delaware—
- Constitution (1776), chief magistrate or president
- Constitution (1792), governor
- Constitution (1897), governor and advisory board

Florida—
- Constitution (1838), governor
- Constitution (1868), governor and board

Georgia—
- Constitution (1777), governor and General Assembly
- Constitution (1789), governor
- Statute (1897), advisory board created

Idaho—
- Constitution (1889), board

Illinois—
- Constitution (1818), governor
- Statute (1897), advisory board created
- Statute (1917), Department of Public Welfare with a division of pardons and paroles established

Indiana—
- Constitution (1816), governor
- Statute (1903), advisory board established

Iowa—
- Constitution (1846), governor
- Code (1913), governor and advisory board
- Statute (1919), governor and advisory board

Kansas—
- Constitution (1859), governor
- General Statutes (1915), governor and advisory board

Kentucky—
- Constitution (1792), governor

Louisiana—
- Constitution (1812), governor and Senate
- Constitution (1879), governor and advisory board

Maine—
- Constitution (1819), governor and council
- Statute (1917), advisory board added

Maryland—
- Constitution (1776), governor
- Statute (1918), advisory board established.

Massachusetts—
- Constitution (1780), governor and council
- Statutes (1913, 1916, 1917), advisory board added

Michigan—
- Constitution (1835), governor
- Statute (1893), advisory board established

Minnesota—
- Constitution (1857), board

Mississippi—
- Constitution (1817), governor
- Statute (1916), advisory board established

Missouri—
- Constitution (1820), governor
- Statute (1909), pardon attorney
- Statute (1917), advisory board established
- Statute (1921), Department of Penal Institutions created

Montana—
- Constitution (1889), governor and board

Nebraska—
- Constitution (1866–67), governor
- Revised Statutes (1913), governor and advisory board
- Statutes (1919), governor and Department of Public Safety

Nevada—
- Constitution (1864), board

New Hampshire—
- Constitution (1784), president and council
- Constitution (1792), governor and council

New Jersey—
- Constitution (1776), governor and council
- Constitution (1884), court of pardons

New Mexico—
- Constitution (1912), governor
- Statute (1915), advisory board created

New York—
- Constitution (1777), governor
- Consolidated Laws (1918), governor and advisory board; governor may also appoint a single person to hold clemency hearings and report recommendations to him, Consolidated Laws (1918)

North Carolina—
- Constitution (1776), governor
- Statute (1917), advisory parole board created

North Dakota
- Constitution (1889), governor
- Constitutional Amendment (1900), board

Ohio—
- Constitution (1802), governor
- Code (1912), governor and advisory board
- Statute (1917), governor and board of clemency

Oklahoma—
- Constitution (1907), governor
- Statute (1907–8), board. Declared unconstitutional in *ex parte* Ridley, 3 Okla. Cr. 350.
- Statute (1913), advisory board established
- Statute (1916), pardon attorney provided for.

Oregon—
- Constitution (1857), governor
- Statute as amended (1915), advisory parole board

Pennsylvania—
- Constitution (1776), governor and council
- Constitution (1790), governor
- Constitution (1873), governor and board

Rhode Island—
- Charter (1663), governor and General Assembly
- Constitution (1842), governor could reprieve and the Assembly could pardon
- Constitutional Amendment (1854), governor and Senate

South Carolina—
- Constitution (1790), governor
- Code (1912), governor and advisory board

South Dakota—
- Constitution (1889), board for serious offenses; governor for lesser offenses

Tennessee—
- Constitution (1796), governor
- Code (1918), governor and advisory parole board

Texas—
- Constitution (1835), governor and council
- Constitution (1836), president
- Constitution (1845), governor
- Civil Statutes (1911), governor and board of pardon advisers

Utah—
- Constitution (1895), board

Vermont—
- Constitution (1777), governor and council
- Constitution (1786), governor and council
- Constitutional Amendment (1836), governor
- Public Statutes (1906), governor may ask three judges of Supreme Court to sit with him

Virginia—
Constitution (1776), governor and council
Constitution (1850), governor

Washington—
Constitution (1889), governor
Statute (1897), advisory board established
Statute (1899), Repeals Act creating advisory board

West Virginia—
Constitution (1861–1863), governor
Statutes (1899, 1901), advisory board
Statute (1905), Repeals Act creating advisory board
Pardon attorney

Wisconsin—
Constitution (1848), governor

Wyoming—
Constitution (1889), governor
Compiled Statutes (1910), governor and advisory board

NOTE.—This table does not attempt to indicate the form of pardon authority under all the constitutions of each state, since the same form was sometimes retained in successive constitutions. It shows only the changes in the form of the pardoning authority in the several states.

At the present time no uniform organization or type of pardon authority exists in the American states. Twelve different forms for administering the pardon power may be distinguished. These, with the states included in each group, may be classified as follows:

I. The governor alone: Arkansas, Kentucky, Virginia, Wisconsin.

II. Governor and Senate: Rhode Island.

III. Governor and Executive Council: New Hampshire.

IV. Advisory Board to governor and Executive Council: Maine and Massachusetts.

V. Governor and Advisory Pardon Board: Alabama, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Missouri, Michigan, Mississippi, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Washington, Wyoming.

VI. Governor may create a temporary advisory board consisting of three members of Supreme Court, and may accept or reject its advice: Vermont.

VII. Governor and Board of Pardons. Governor may grant clemency only with consent of Board, of which he is not a member: Arizona, Delaware, Montana, New Mexico, Pennsylvania.

VIII. Board exercises the granting of clemency. The governor is a member, and his consent is necessary to grant clemency: Florida, Nevada, New Jersey, Utah.

IX. Board exercises the granting of clemency. The governor is a member but majority action governs, regardless of whether the governor is of the majority or of the minority: Idaho.

X. Board. Clemency can be granted only by unanimous action of the Board of which the governor is a member: Connecticut, Minnesota, North Dakota.

XI. Governor and pardon attorney. The latter acts in an advisory capacity only: Oklahoma, West Virginia.

XII. Two pardon authorities with divided responsibility. Pardon Board, of which governor is not a member, has full authority to grant clemency in (*a*) all cases of capital punishment, imprisonment for life, or for a longer term than two years, (*b*) in cases where a fine exceeds two hundred dollars. Governor has full authority to grant clemency in all cases where punishment or fine is less than that stated above: South Dakota.

So much variation exists in the organization of the pardoning authority in the United States that a logical classification is difficult without unduly enlarging the number of classes. Even in the foregoing classification there are some minor differences existing within some of the classes. In New York, in addition to an advisory board, the governor may appoint a person to conduct a hearing in an application for clemency. Such person is vested with power to secure and hear testimony, and upon the conclusion of the hearing all testimony and recommendations are forwarded to the governor for his action.[1]

In Iowa,[2] North Carolina,[3] Oregon,[4] and Tennessee[5] state parole boards act as pardon boards. In Washington pardons are recommended to the governor by the prison board and the board of reformatory managers. In Colorado[6] and Wyoming[7] the governor is the president of the board which investigates all applications for clemency and then lays the facts and recommendations before the governor for his action.

[1] Consolidated Laws of New York (1918), Vol. VI, sec. 262.

[2] Supplement Code of Iowa (1913), sec. 5718–a23.

[3] Public Laws of North Carolina, Session 1917, chap. 278, sec. 1.

[4] General Laws of Oregon, 1915, chap. 176, sec. 1.

[5] Tennessee, Thompson's Shannon's Code (1918), sec. 7516a–15.

[6] Colorado Statutes (1914), sec. 2048.

[7] Wyoming Compiled Statutes (1910), secs. 551–52.

Differences exist also in the names by which pardon boards are known. In New Jersey the pardon authority is designated as the Court of Pardons; in Ohio it is the Ohio Board of Clemency; in Illinois it is the Division of Pardons and Paroles of the Department of Public Welfare; in Missouri it is the Department of Penal Institutions; and in Nebraska it is the Secretary of the Department of Public Welfare. As a part of the organized pardon machinery two states have established the office of pardon attorney to the governor.[1]

The personnel of pardon boards is of a most varied character, there being no unity of opinion as to the type of individual who should sit upon such a board. In eleven states the governor is a member of such board.[2] In four states the lieutenant governor is a member of such board, but in no state do both the governor and lieutenant governor sit on this board [3] In seven states the secretary of state is made a member of this board,[4] and in one state the secretary of the commonwealth has a seat.[5] The state auditor is a member in five states[6] and the state controller in one state.[7] Two states use the superintendent of public instruction as a member of the pardon board,[8] and formerly a third state did likewise.[9] More states are agreed that the attorney-general should have membership on the board than is true of any other state officer. There are fourteen states in this category.[10] This is probably due to a feeling that the attorney-general will better safeguard the interests of the state than will any other member of the board.

The state treasurer is a member of the board in two states.[11] In four states the chief justice of the supreme court is a member of the board,[12] and in two of these states the entire membership of this court is given representation on the board of pardons.[13] In one state a judge of the Supreme Court of Errors, designated by the judges of that court,

[1] Oklahoma, West Virginia.

[2] Colorado, Connecticut, Florida, Idaho, Minnesota, Nevada, New Jersey, North Dakota, Utah, Vermont, Wyoming.

[3] California, Delaware, Louisiana, Pennsylvania.

[4] Alabama, Delaware, Florida, Idaho, Montana, South Dakota, Wyoming.

[5] Pennsylvania. [6] Alabama, Delaware, Montana, Oklahoma, Wyoming.

[7] Florida. [8] Arizona, Wyoming. [9] Oklahoma.

[10] Alabama, Arizona, California, Florida, Idaho, Louisiana, Montana, Minnesota, Nevada, North Carolina, North Dakota, Pennsylvania, South Dakota, Utah.

[11] Delaware, Wyoming.

[12] Minnesota, Nevada, North Dakota, Utah. [13] Nevada, Utah.

sits on the board.[1] In two states the chancellor is a member,[2] and in one of these states six judges of the Court of Errors are also members of the pardon board.[3] Also in one state the governor may request to sit with him not more than three judges of the Supreme Court, such as he may select. These are to advise him in matters of clemency.[4] Two states consider it desirable to have the trial judge sit as a member of the board.[5] It is quite evident that a number of states have felt that the state judiciary should be represented in some form or other on the board of pardons.

In another group of states the policy has been followed of placing on the pardon board some individual who is in close contact with applicants for clemency during their period of incarceration. In one state the wardens of the two state prisons are members of the board.[6] The superintendent of prisons is a member in two states,[7] while in one state the chairman of the board of directors of the state prison[8] and the chairman of the board of state charities[9] function in this capacity.

In one state the commissioner of agriculture is a member of the board,[10] and in another state a similar official was likewise represented on the board until the statute creating the board was declared unconstitutional.[11]

The membership of the boards thus far described consists wholly of members who are state officers, most of whom are also elective officers. They are members of pardon boards ex officio. But some states have made provision for the representation of private citizens on pardon boards. In one state it is provided that the chairman of the board shall be a citizen chosen by the other two members.[12] In another state four members are lay citizens appointed by the governor.[13] In Connecticut there are four lay members, one a physician, appointed by the governor with the consent of the senate. In Georgia clemency is vested in a prison commission of three members elected by the voters. The Indiana board consists of three members appointed by the governor. The Iowa parole board, which is the advisory pardon board, consists of three members (one of whom must be an attorney), appointed by the governor, and only two members may belong to the same political party. There

[1] Connecticut.
[2] Delaware, New Jersey.
[3] New Jersey.
[4] Vermont.
[5] Louisiana, South Dakota.
[6] California.
[7] Illinois, New York.
[8] North Carolina.
[9] North Carolina.
[10] Florida.
[11] Oklahoma.
[12] Arizona.
[13] Colorado.

are also some eleven other states whose clemency boards consist wholly or partially of private citizens appointed by the governor.[1]

The system of state reorganization in Illinois provides for a department of public welfare, and within this department is the division of pardons and paroles which deals with all matters of clemency. The superintendent of the division, the superintendent of prisons, and the assistant director of the department of public welfare constitute, in effect, a clemency board.

Under the system of state reorganization in Nebraska the governor possesses the power to pardon and grant commutation, while the secretary of the department of public welfare has the power to parole. The governor seeks the advice of the secretary, however, in most cases of pardon and commutation.

The personnel of pardon boards in the various states is set forth in the following table:

PERSONNEL OF PARDON BOARDS

Alabama—Attorney-general, secretary of state, state auditor

Arizona—State superintendent of public instruction, attorney-general, third citizen (chairman) to be chosen by the two former officials

Arkansas—No board, vested solely in the governor

California—Lieutenant governor, attorney-general, warden of San Quentin Prison, warden of Folsom Prison

Colorado—Governor (president of board), four private citizens appointed by governor

Connecticut—Governor, judge of Supreme Court of Errors designated by the judges of that court, four private citizens (one a physician) appointed by governor with consent of Senate

Delaware—Chancellor, lieutenant governor, secretary of state, state treasurer, auditor of accounts

Florida—Governor, secretary of state, controller, attorney-general, commissioner of agriculture

Georgia—Prison Commission of three members elected by voters

Idaho—Governor, secretary of state, attorney-general

Illinois—Division of Pardons and Paroles. In effect the superintendent of Division of Pardons and Paroles, the superintendent of Prisons, and the assistant director of Department of Public Welfare constitute the board

Indiana—Three private citizens appointed by governor

[1] Maine, Maryland, Massachusetts, Missouri, Michigan, Mississippi, New York, North Dakota, Ohio, South Carolina, Texas.

Iowa—Three private citizens (one an attorney) appointed by governor; not more than two may belong to the same political party

Kansas—Three persons (one an attorney) appointed by governor with consent of Senate

Kentucky—No board, clemency vested solely in the governor

Louisiana—Lieutenant governor, attorney-general, presiding judge of trial court

Maine—Board of Prison Commissioners consisting of three members appointed by governor with consent of council

Maryland—Three members appointed by governor with consent of Senate

Massachusetts—Board of Parole of Massachusetts Bureau of Prisons consisting of three members appointed by governor with consent of council

Michigan—Three residents appointed by governor, one of whom must be an attorney and one a physician

Minnesota—Governor, attorney-general, chief justice of Supreme Court

Mississippi—Five members appointed by governor

Missouri—Department of Penal Institutions consisting of five members appointed by governor with consent of Senate, not more than three members to belong to same political party

Montana—Secretary of state, attorney general, state auditor

Nebraska—Secretary of Department of Public Welfare

Nevada—Governor, justices of Supreme Court, attorney-general

New Hampshire—Governor and executive council; this latter body consists of two members from the Senate and three members from House of Representatives

New Jersey—Governor, chancellor, six judges of Court of Errors

New Mexico—Board of Penitentiary Commissioners consisting of five members appointed by governor

New York—Board of Parole is advisory pardon board: it consists of three persons, superintendent of prisons and two other members appointed by governor with consent of Senate; governor may also appoint other individuals to conduct hearings and make report to him

North Carolina—Advisory Board of Parole consisting of attorney-general, chairman of Board of Directors of state prison, chairman of Board of State Charities

North Dakota—Governor, chief justice of Supreme Court, attorney-general, two electors appointed by governor

Ohio—Board of clemency consisting of two members appointed by governor

Oklahoma—Pardon attorney who is an assistant attorney-general of the state

Oregon—Superintendent of state prison, governor's secretary, state parole officer, and two members appointed by governor

Pennsylvania—Lieutenant governor, secretary of commonwealth, attorney-general, secretary of internal affairs

Rhode Island—Governor and Senate

South Carolina—Three members, who may hold no other office than notary public, appointed by governor

South Dakota—Presiding judge, secretary of state, attorney-general

Tennessee—Board for Administration of State Institutions exercises parole power. It consists of governor, state treasurer, and a general manager

Texas—Board of Pardon Advisers consisting of two voters appointed by governor

Utah—Governor, justices of Supreme Court, attorney-general

Vermont—Governor may request to sit with him not more than three judges of Supreme Court, such as he may select

Virginia—No board, clemency vested solely in the governor

Washington—Prison Board

West Virginia—Pardon attorney

Wisconsin—No board, clemency vested solely in the governor

Wyoming—Governor, secretary of state, state treasurer, state auditor, state superintendent of public instruction

In a number of states the clemency power is vested in two distinct sets of authorities. Particularly is it customary in such states to intrust to one body the consideration of applications for parole, while other forms of clemency are considered by the other body. The State Penitentiary Board in Arkansas, the State Board of Prison Directors in California, and a parole board in Connecticut serve as parole authorities distinct from the pardoning authorities in these states. In Indiana there is a Board of Commissioners of Parole Prisoners for each separate state prison. Kansas, Kentucky, Louisiana, and Minnesota have parole boards which are also distinct from the authorities that deal with other forms of clemency in these states. In Missouri boards of parole are established in every judicial circuit in the state composed of a single county, and having a criminal court therein, and wherein there is a city of from 200,000 to 500,000 inhabitants. Boards of parole are also established in Missouri in counties of from 80,000 to 200,000 inhabitants adjoining cities of more than 500,000 inhabitants.

The parole board in Montana is distinct from the State Board of Pardons. In New Jersey the Board of Inspectors of Prisons recommends

paroles; this is also true in Pennsylvania where such a board is connected with each prison. North Carolina, North Dakota, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin also have parole boards that are distinct from other pardon authorities in these states.

The composition of these parole boards varies somewhat but most frequently the membership consists of the penitentiary directors or commissioners with the warden associated. This kind of a board, it is felt, is most conversant with the prison record of applicants for parole and can therefore intelligently determine when parole should be granted.

CHAPTER III

ADMINISTRATION AND OPERATION OF PARDON AUTHORITIES

CRITICISM OF PARDON AUTHORITIES

As previously stated, at one period in our history the pardoning power was vested almost exclusively in the governor.[1] But new administrative duties placed upon him, and also an increase in requests for clemency because of an enlarged prison population made it impossible for him to give the detailed attention to clemency problems which was demanded. Added to these reasons was the feeling which was quite prevalent that some executives had administered this power with such laxness that the system needed further regulation and safeguarding. The debates in a number of state constitutional conventions furnish clear evidence of this feeling.

The discussion on this question in the California Constitutional Convention of 1878–79 is a typical illustration. From the proceedings the following extracts are noted:

Mr. Barbour said the tenth resolution of the platform of the Workingmen's party, on which he was elected, provided that the pardoning power then vested in the governor should be abolished. Nearly one half of the people voted upon that proposition in voting for the candidates of the Workingmen's party, and there was no reason to presume that the other half were opposed to it.[2]

Mr. Shafter stated that governors had often been influenced by sentiment and emotion. There had been great abuses in this state and elsewhere as everybody understood.[3]

Mr. Gregg and Mr. Wickes said that the pardoning power in the past had been stretched to its limits.[4]

Mr. Barry of the Committee on Pardons said that this power had been abused in the past because of pressure put on the governor.[5]

Mr. Caples argued that too much discretion was granted to the governor and that it should be limited.[6]

[1] *Supra*, p. 10.

[2] *Debates and Proceedings, California Constitutional Convention* (1878–79), I, 372.

[3] *Ibid.*, p. 274. [4] *Ibid.*, p. 277. [5] *Ibid.*, p. 278.

[6] *Ibid.*, p. 278.

Mr. White said that more time of the governors had been used in hearing applications and solicitations for pardons than on any other duty. Each governor had requested that this power be taken out of his hands.[1]

Mr. Smith, of San Francisco, said that there were entirely too many pardons and therefore he was in favor of abolishing the pardon power altogether. The governor should be the last man to possess this power because he is generally too tender.[2]

It is true that some members in the convention denied or minimized these assertions but it is evident that a feeling prevailed that the clemency power had been abused in the past.

In the Illinois Constitutional Convention of 1870 there were assertions that the pardon power had been improperly used.

Mr. Church said that some fifteen years previous the pardoning power had been used very indiscriminately by Governor Matteson.[3]

Mr. Goodhue thought that past difficulties resulted because petitions for pardons had been so numerous, and pressure exerted had been so great that it had been impossible for the governor to give these petitions the consideration and deliberations that they required.[4]

Mr. Medill favored the section as reported by the committee on the Executive Department because, in his judgment, it properly limited the powers of the governor in this matter.[5]

As a result of the charges of abuse a resolution was introduced and carried that the warden of the penitentiary be required to furnish a list of all convicts pardoned from 1860 to 1870.[6] On January 31, 1870, the governor submitted such a list but the statement covered the pardons granted from January 11, 1869, to January 11, 1870, only.[7]

STATISTICS ON PARDONS IN ILLINOIS, 1869–1870

Persons in penitentiary, January 11, 1869	1,264
Persons received, December 1, 1868, to December 1, 1869	546
Pardoned from penitentiary and county jails	108
Number of applications for pardon refused	356

Offenses of convicts pardoned: assault with intent to commit robbery, 1; assault with intent to commit murder, 5; arson, 1; counterfeiting, 1; burglary,

[1] *Debates and Proceedings, California Constitutional Convention* (1878–79), I, 275.

[2] *Ibid.*, p. 368.

[3] *Debates and Proceedings, Illinois Constitutional Convention* (1870), I, 789.

[4] *Ibid.*, p. 787.

[5] *Ibid.*, p. 786.

[6] *Ibid.*, p. 154.

[7] *Ibid.*, pp. 330–41, 343.

14; forgery, 1; horse-stealing, 1; incest, 1; larceny, 48; murder, 4; manslaughter, 12; rape, 7; refusing votes, 2; robbery, 9; perjury, 1.

The pardons were granted on recommendations of either the trial jury, judge, prosecuting attorney, influential citizens, state or county officials, etc. The names of the most prominent persons making the recommendations were printed in each case. No standard seemed to exist as a basis for granting the pardons.

In Illinois from 1856 to 1876 there were 92 persons sentenced to life terms. During this period 10 died and 36 were pardoned. Only one of the whole 46 had served more than 10 years.[1]

In the Iowa Constitutional Convention in 1857, Mr. Clarke moved to amend the section relating to the pardoning power so that it would require the governor to give to the legislature the reasons for each pardon granted. This, he argued, would prevent the improper exercise of the pardoning power "as it prevails in many states."[2]

Discussion in the Massachusetts Constitutional Convention in 1853 by Mr. Rufus Choate,[3] Mr. Thompson,[4] and Mr. Bradbury[5] would seem to indicate that the pardoning power in Massachusetts had, on the contrary, been used with the greatest discretion and with due regard to both firmness and humanity.

In the Kentucky Constitutional Convention of 1890, Mr. Ramsey asserted that in Kentucky from December 3, 1879, to March 23, 1881, there were 845 pardons granted by the governor. Of these 129 were granted without any reason being given. In 390 cases pardons were granted to persons convicted of kukluxing in Laurence County upon the request of the judge of that district. Mr. Ramsey said only 447 pardons were granted in Michigan during seventeen years.[6]

Likewise in Pennsylvania dissatisfaction was expressed at different times with the lodgment of the pardoning power in the governor, and assertions were made that the power was not always wisely exercised. The constitution of 1790 came in for criticism soon after its adoption because it gave this power exclusively to the governor.

Community sentiment, intimacy with daily affairs, neighborhood knowledge of crimes committed, familiarity with criminal trials and constant

[1] Russell Gray, "The Use and Abuse of the Pardoning Power," *International Review*, VII, 502–3.

[2] *Iowa Constitutional Debates* (1857), I, 587.

[3] *Massachusetts Constitutional Debates* (1853), I, 968.

[4] *Ibid.*, p. 976. [5] *Ibid.*, p. 973.

[6] *Debates of Kentucky Constitutional Convention* (1890), I, 1269.

approachability made governors susceptible to deception, false sympathetic evidence, and the obligations or feelings of friendliness founded upon political or personal considerations. The wisdom of the constitution-makers had not been sufficient to anticipate the resulting abuses, but well grounded and frequent complaints followed within a few years.[1]

In an article published in 1820 by Dr. James Mease, who was a prominent member of the American Philosophical Society, he said:

> I have no hesitation in saying that the continual and monstrous abuse by the governors of this great privilege is a very powerful cause of the increase of crimes and that the best code of penal laws that can be framed will be defeated unless it is checked. . . . . Governors have much to answer for who thus defeat the laws and offer a premium for vice.[2]

This general dissatisfaction was shown in the constitutional convention that met in 1837 and which requested from the secretary of the commonwealth a statement showing the extent of the use of the clemency power under the constitution of 1790. This statement when furnished

CLEMENCY GRANTED IN PENNSYLVANIA DURING PERIOD OF CONSTITUTION OF 1790*

Governor	Murder	High Treason	Imprisonment	Fines and Forfeitures	Militia Fines
Thomas Mifflin	6	14	511	735	.....
Thomas M. Kean	1	1	1,061	881	.....
Simon Snyder	1	.....	990	525	124
William Findley	.....	.....	431	118	649
Joseph Hiester	.....	.....	303	66	439
J. Andrew Shulze	3	.....	724	100	7
George Wolf	1	.....	424	87	.....
Joseph Ritner	.....	.....	17	14	371
Total	12	15	4,461	2,526	1,590

* *Proceedings and Debates of Pennsylvania Constitutional Convention* (1837), II, 56.

showed that there had been 53 executions and 27 pardons or remissions for murder and high treason, the penalty for these offenses being death. It also showed there had been 4,461 pardons and remissions in cases of imprisonment, 2,526 in cases of fines and forfeitures, and 1,590 in cases of militia fines.[3]

[1] Smithers and Thorn, *Executive Clemency in Pennsylvania*, p. 35.

[2] Vol. LII of Pamphlets, Philadelphia Law Association Library.

[3] *Proceedings and Debates of Pennsylvania Constitutional Convention* (1837), II, 56.

The number of persons executed under the above-named governors was as follows: Thomas Mifflin, 12; Thomas M. Kean, 11; Simon Snyder, 9; William Findley, 4, Joseph Hiester, 4; J. Andrew Shulze, 6; George Wolf, 6; Joseph Ritner, 1; total, 53.

In spite of the criticism provoked by this condition no change was made in the clemency authority by the convention. In fact the new constitution of 1838 used the identical words of the constitution of 1790 in describing the pardoning power. "The amended constitution, however, was not popular and the campaign charges that the governor's power of pardon was left untrammelled for political reasons probably had something to do with the small majority of twelve hundred and twelve votes which the new organic law received."[1] The discussion in the convention helped to create a sentiment, however, which resulted in a curtailment of the use of this power by several successive governors. From 1839 to 1861 six governors granted but 560 pardons.[2]

It was the general belief that the new criminal code of 1860, in connection with some supplementary legislation,

> would greatly reduce the number of pardons because the punishments were on the whole milder and the principle of discretion within a maximum enabled the judges to temper sentences according to those merciful features which formerly could receive recognition only at the hands of the governor. The expectation, however, was not realized, thereby causing a general conviction among conservative citizens that the fault lay in the method of exercising the power. This strongly revived the former movement against the one-man power. The demand for a new constitutional provision which then began to assume definite proportions permitted concentration of effort to such an extent that when the Act of April 11, 1872, providing for the calling of a convention was passed there was a very general understanding that executive clemency would receive special attention.[3]

The debates in the convention were chiefly concerned with charges of the abuse of the pardoning power by the governor, a defense of past governers, and a discussion as to how this authority should be constituted in the new constitution. Former governors, Bigler and Curtin, who were members of the convention, explained in the course of the debates the enormous pressure to which they had been subjected to grant pardons, and the great amount of time required to give attention to this matter.

Mr. Barclay offered a resolution that the secretary of the commonwealth furnish the convention with a list of all pardons obtained from

[1] Smithers and Thorn, *Executive Clemency in Pennsylvania*, p. 37.

[2] *Ibid.*, pp. 37–38. [3] *Ibid.*, p. 40.

the different governors of the state from January 1, 1838, to date, with the names of the persons pardoned, the nature of their offenses, the time when such persons were convicted, if known, and the times when such persons were pardoned.[1]

This resolution failed of passage but J. N. Purviance submitted the following statistics showing the average number of pardons granted annually under previous governors.[2]

Governors	Average Pardons per Year	Governors	Average Pardons per Year
Mifflin	132	Porter	120
M'Kean	212	Shunk	81
Snyder	177	Johnson	126
Findley	434	Bigler	108
Heister	262	Pollock	53
Schultz	136	Packer	72
Wolf	83	Curtin	127
Ritner	160	Geary	71

But Mr. Armstrong in commenting on these statistics asserted that until the Act of 1860 was passed a sentence served to the end was followed by political disability and therefore many pardons were granted a few days before the expiration of a sentence in order that political disability might be removed. This condition was corrected by the Act of 1860.[3]

The foregoing discussion regarding the exercise of the pardoning power in Pennsylvania is typical of the feeling that undue pressure by interested parties and the press of other public duties devolving upon the governor made it impossible for him to exercise this power without some capable assistance. Evidence of a similar feeling of dissatisfaction with early conditions in Indiana is shown by the following:

> The new constitution differs from the old in few points more widely than upon the pardoning power. Two lines in the old in place of half a page in the new. It merely said that the governor "shall have power to remit fines and forfeitures, grant reprieves and pardons, except in cases of impeachment." We know the object of the change. The granting of pardons, remissions, etc., had become an abuse, and it was the intention to arrest that abuse.[4]

That dissatisfaction prevailed in Arizona is indicated from an extract from a judicial decision.

> It is a matter of common knowledge that at the time or just prior to the convening of the constitutional convention considerable feeling and criticism

[1] *Debates of Pennsylvania Constitutional Convention* (1872–73), I, 91.

[2] *Ibid.*, II, 376. [3] *Ibid.*, p. 382. [4] *State* v. *Dunning*, 9 Ind. 23 (1857).

were indulged by the people of the territory over what was generally thought to be an abuse of the pardoning power, and no one knew it better than the members of the convention.[1]

An attempt was made to amend the New York constitution in 1913 so as to create a Court of Pardons to consist of the governor, chief judge, and three judges of the Court of Appeals annually designated by the governor.[2] It is not certain that this attempt was due to dissatisfaction with the present system.

The view suggests itself: Could a state executive, in any of these circumstances, have been impeached for misuse of the pardoning power? It seems that no attempt has ever been made to do so, and the only judicial dicta which infers that such action may be taken is found in a few rather recent Oklahoma decisions.[3] On the other hand there is considerable opinion that there is no judicial right, unless granted by law, or unless fraud has entered into a case, to review or impugn the motives or opinions of the executive in granting clemency.[4]

None the less, a prominent student of criminal law remarks:

> In popular writings we often meet with injuriously false views on this subject. Nothing can be more pernicious than the opinion, sometimes afloat, which assigns to the President or Governor the authority to pardon without limit and denies to the impeaching power the right to interfere. The granting of pardons is discretionary in its nature; therefore it is necessarily the more open to control by the impeaching power. If it comes to be understood that a single man, intrusted with the high function of pardon, can open all the prisons of the country and let every guilty person go free, thus at a blow striking down the law itself, and not be himself punished for the high misdemeanor the most disastrous consequences to liberty and law will sooner or later follow. Such a conclusion is itself the annihilation of law, and only upon law can liberty repose. Still this sort of executive abuse will not authorize the courts to decline giving effect to the executive pardon.[5]

LIMITATIONS UPON PARDON AUTHORITIES

In view of such a widespread demand for the removal of abuse in the exercise of the pardoning power it is of interest to note some of the

[1] *Laird* v. *Sims*, 16 Ariz. 521 (1915).

[2] *New York State Constitution Annotated*, Part II, pp. 84–85.

[3] "An abuse of the pardoning power may be so great as to warrant an impeachment of the officer who exercises it." *Ex parte* Crump, 10 Okla. Cr. 139.

[4] *Martin* v. *State*, 21 Tex. App. 1; Greathouse's Case, Fed. Cas. No. 5741; Opinion of the Justices, 120 Mass. 600; *Ex parte* Hunt, 10 Ark. 284.

[5] Bishop, *New Criminal Law*, secs. 922 and 926.

provisions that have made it subject to regulation and control. In some state constitutions there are provisions which regulate in part the operation of such authority. But the more common method of regulation is through statutory legislation. Most pardon authorities are also authorized to formulate and adopt rules and regulations which are not inconsistent with constitutional and statutory provisions on this subject. As a general rule all pardon authorities are subject to some degree of legislative control. The only states at the present time in which the constitution does not specifically authorize the legislature to prescribe rules governing these authorities are Connecticut, Delaware, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Tennessee, and Vermont. But in times past some of the other states made no specific provision for legislative control. This was true of Illinois under its constitution of 1818, of Indiana under its constitution of 1816, of Iowa under its 1846 constitution, of Kansas under the constitution of 1857, and of Maine under the 1819 constitution.

The members of state constitutional conventions have not been agreed as to the extent of the control which legislative assemblies should exercise over pardon authorities. But the degree of control may be classified under two groups. Pardon authorities in a number of states are subject (*a*) to rules prescribed by law,[1] while in a larger number of states such pardon authorities are subject (*b*) only to rules prescribed by law which govern the manner of applying for clemency.[2]

Bearing in mind that the working and operation of pardon authorities are regulated by constitutional provisions, statutes, and by rules formulated by pardon authorities themselves, it is necessary to examine in some detail the limitations and conditions under which the clemency power is exercised.

The question whether this authority may grant clemency before or after conviction is one which has commanded some attention. At the close of the eighteenth century it was uncommon to restrict pardon authorities in this respect. The first constitutions of Massachusetts, New Hampshire, and New Jersey provided that a pardon granted before conviction was of no avail, but the first constitutions of the other original

[1] Alabama, Arizona, Arkansas, Indiana, Iowa, Kansas, Minnesota, New Mexico, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington, West Virginia.

[2] California, Colorado, Florida, Georgia, Idaho, Illinois, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, South Dakota, Utah, Wisconsin, Wyoming.

states contained no such restrictions on the pardoning power. Likewise the Alabama constitution of 1819, the Indiana constitution of 1816, the Kentucky constitution of 1792, the Louisiana constitution of 1812, the Missouri constitution of 1820, and the Mississippi constitution of 1817 were all silent on this point. But a change in view was already showing itself, for in the Connecticut constitution of 1818, the Georgia constitution of 1789, the Illinois constitution of 1818, the Maine constitution of 1819, the New York constitution of 1821, the Ohio constitution of 1802, the South Carolina constitution of 1790, and the Tennessee constitution of 1796 it was provided that the power of clemency could not be exercised until after conviction.

This view that a pardon should not be permitted to be pleaded as a bar to prosecution has prevailed, until at the present time the constitutions of Delaware, Kansas, Kentucky, Maryland, Pennsylvania, Vermont, and Washington are the only ones which do not forbid the granting of clemency before conviction. Kansas has statutory legislation which prohibits the granting of pardons before conviction.[1]

In so far as can be determined the power to pardon before conviction does not seem to have been abused by those governors who have possessed the power, or by presidents of the United States who are also unrestricted in this respect. In the discussions in the Kentucky constitutional convention of 1890 there was a positive defense of the exercise of this power in this manner. Some favored such an arrangement so that the governor could pardon for technical violations of law before trial. It was asserted that this power to pardon before judgment had proved especially beneficial and useful immediately after the Civil War—also that it had encouraged good citizens to help suppress lawlessness and feuds. Mr. Bullitt said that after the Civil War Kentucky, instead of being left in the condition of Missouri and several other states, was immediately restored to tranquillity through the power of the governor to pardon before judgment, and that Missouri at last had to resort to it.[2] Yet pardoning before conviction is liable to abuse, and the occasions when such power should be used are so rare that it would seem wise not to extend its exercise to the pardoning authorities.

Another question which also affects the scope or jurisdiction of the clemency power is one which concerns the offenses which may be dealt with through the ordinary procedure, and also those offenses which may be pardoned only by exceptional methods. The regular pardoning

[1] General Statutes of Kansas (1915), sec. 6759.

[2] *Debates of Kentucky Constitutional Convention* (1890), p. 1257.

power in the American states is usually forbidden to extend clemency in cases of conviction for treason, or impeachment, or both. Twenty-seven states do not permit their regular pardoning authorities to pardon in either of these instances.[1]

In sixteen states the ordinary authorities cannot pardon in cases of impeachment but apparently may pardon for conviction of treason.[2] One state allows this authority to pardon in case of impeachment but prohibits the exercise of clemency for conviction of treason;[3] while four states have no constitutional prohibition against the granting of clemency for conviction of treason and impeachment.[4]

Of the twenty-seven states in which the regular pardon authorities are not permitted to pardon for conviction of treason or impeachment, nineteen provide that in case of conviction for treason the governor may suspend the execution of the sentence until the meeting of the next legislature, which may pardon or reprieve or order the execution of the sentence.[5] Of the remaining eight states in this group, three provide that the governor with the advice and consent of the senate may pardon for treason;[6] one, Vermont, grants to the governor the power to pardon for treason, but only after the end of the next session of the General Assembly; while the constitutions and statutes of four states are silent as to who may exercise clemency in cases of conviction for treason.[7]

In the second group of sixteen states where the ordinary authorities cannot pardon in cases of impeachment the constitutions and statutes of these states are silent as to how clemency may be granted for this offense. It would seem that there is no redress from the penalty fixed unless it rests with the legislature itself. In Oregon the governor may pardon for impeachment but cannot pardon for treason. But in the latter case he may suspend the execution of the sentence until it is reported to the next session of the Legislative Assembly, which may

[1] Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, South Dakota, Texas, Utah, Vermont, Wisconsin, Wyoming.

[2] Connecticut, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia.

[3] Oregon. [4] Illinois, Kansas, Montana, Washington.

[5] Arizona, California, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New York, North Dakota, Ohio, South Dakota, Utah, Wisconsin, Wyoming.

[6] Arkansas, Mississippi, Texas. [7] Alabama, Colorado, Missouri, New Mexico.

either pardon, commute the sentence, or order the execution of the sentence.

In all states there are prescribed rules which govern the practice and procedure of pardoning authorities. These are embodied either in state constitutions, or statutes, or in regulations which the pardoning bodies are authorized to formulate. Some constitutions such as those of Idaho, Mississippi, Montana, North Dakota, and Utah are quite full in defining the composition, powers, and regulations governing pardon authorities, while the constitutions of Delaware, Illinois, Kansas, Louisiana, Maine, Maryland, Minnesota, New Hampshire, New Mexico, Oklahoma, Rhode Island, and Tennessee are brief in this respect. Likewise the statute law of Idaho, Illinois, Kansas, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming is quite detailed on these same subjects, while that of Delaware, New Jersey, New Mexico, Tennessee, Washington, Virginia, and West Virginia is meager. Again there is considerable variation in the rules and regulations which pardon authorities have formulated. Some like those of Pennsylvania are extended, others like those of Utah and Connecticut are very limited.

No uniformity seems to exist in these respects. Constitutions, statutes, and rules are all made use of, but some states deem it necessary to load their constitutions with matters pertaining to clemency which in other states are put in the form of statutes, or even merely framed as a board rule or regulation.

ADMINISTRATION OF CLEMENCY

For the purpose of receiving and considering evidence for the granting of clemency it is the practice of the authorities in nearly all the states to hold formal hearings or sessions at fixed times and places. In most states these hearings are prescribed either by constitutional or statute law. But great variation prevails both as to the frequency of such hearings and as to the place where the sessions are held.

TIME OF HEARINGS

The regular meetings of pardon boards are held quarterly in Arizona, Idaho, Illinois,[1] Indiana, Kansas, Louisiana, Minnesota, Mississippi,[2] Nebraska, South Carolina, and Wyoming. Pardon boards hold monthly sessions in Colorado, Georgia, Michigan, Montana, North Carolina, Ohio,

[1] Monthly meetings are held to consider the granting of paroles, but quarterly meetings to consider matters of pardon and commutation.

[2] No meeting of the Mississippi pardon board may be for a longer period than six days.

Oregon, Pennsylvania, except during July and August, and Utah. In Connecticut, Nevada, and North Dakota the boards meet semiannually. In Iowa the meetings are bi-monthly. In New York the board must meet at least ten times annually, while in Rhode Island pardons can only be granted while the state senate is in session, which is during the first four months in each year. In Alabama, California, South Dakota, and Vermont the pardon authorities do not have regular sessions but meet on call. Likewise there are no regular set sessions in Oklahoma and West Virginia, since the problem of examining applications and recommending action is in the hands of a pardon attorney in each of these states. But formerly the pardon board of Oklahoma met monthly, and the members of the pardon board in Missouri are required to reside at Jefferson City and devote their time wholly to the work of the said board. In such states as Arkansas, Kentucky, Virginia, and Wisconsin where the pardoning power is vested solely in the governor the sessions are irregular and informal. In Wisconsin Governor Phillipp made it a practice to ask one of the assistant attorneys-general to sit with him when considering clemency petitions.

PLACE OF HEARINGS

Much variation exists as to the meeting place of the pardoning authorities. In California the advisory board has a permanent secretary and maintains offices in San Francisco. The boards in Arizona, Massachusetts, New York, North Dakota, Oregon, and Utah hold their regular meetings at the state prisons. In Colorado where the board meets monthly, except in July and August, the state statutes provide that at least four meetings each year shall be held in the state prison at Canon City and the other sessions in the governor's office. It appears that although this law has been enacted for several years the board did not begin holding any sessions at the state prison until September, 1919.

In Connecticut board meetings are held either at Hartford or at Wethersfield where the state prison is situated. The Iowa board meets at the reformatory at Anamosa, the penitentiary at Fort Madison, and at the capitol. In Indiana, Kansas, Mississippi, Montana, Pennsylvania, and Texas the meeting of the board is at the capitol; while in Louisiana, North Carolina, and South Dakota the board meets in the office of the attorney-general, which presumably is in the state capitol, but which is in New Orleans in the case of the state of Louisiana. The boards in Idaho and North Dakota meet at the capitol but also visit the state prison during each session.

In Michigan the board holds regular meetings at the Michigan state prison, the Michigan reformatory, the Detroit house of correction, the Marquette prison, and at the executive office. The Ohio board, which meets daily, holds sessions during the first week of each month at the penitentiary, the second week at the state reformatory at Mansfield, and the third week at the woman's reformatory at Marysville. In Vermont the governor may fix the place of hearing, and in Minnesota, the board may direct at what other places it shall meet besides the executive chamber, which place is fixed by law.

If it is the practice of the board, as it is in many states, to interview prisoners who are applicants for clemency it is quite clear that the practice of meeting at the state prison or other place of confinement is to be commended from the standpoint of convenience. But in addition to this advantage there is the further one that a board can in many instances reach a more correct determination after a personal interview with an applicant than if the personal element is not allowed to enter in. Those boards which hold their sessions away from state prisons must, therefore, either arrive at their conclusions without an opportinuty of hearing the petitioners, or must arrange to have such petitioners transported to the place of meeting,

At this point it may be opportune to note that in a number of states some applicants for clemency are first paroled before being pardoned, unless proof is produced to show entire innocence of the crime charged. Granting a parole is quite distinct from granting a pardon—the granting of the latter in some cases being conditioned upon the good behavior of the applicant while he is out on parole. A number of states such as Arkansas, California, Connecticut, Indiana, Kentucky, Louisiana, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin have intrusted the granting of paroles to boards which are separate and distinct from their pardon boards and authorities. These parole boards[1] usually meet at the state prison in order to pass upon the granting of paroles. When a paroled prisoner at a later time applies for a pardon or discharge he is at large in some other part of the state. In considering such cases no useful purpose could be served in requiring the pardon board to meet at the state prison. In these instances the

[1] Parole boards are known by various names in different states. Their sole function is that of passing on applications for parole, therefore they should not be confused with some so-called "parole boards" which are really advisory pardon boards as well as parole boards.

state parole officer can readily meet with the pardon board at any convenient place within the state.

Usually a petition for clemency is filed by the prisoner himself, but most states permit a friend or interested party to file such an application in behalf of the prisoner. This is especially true when some form of clemency other than parole is sought. In some states all outside influence or aid is positively prohibited in the case of one who is applying for parole. Thus in Idaho the statute reads:

> In considering applications for parole it is unlawful for the Board of Pardons to entertain any petition, receive any written communication, or hear any argument from any attorney or other person not connected with the Penitentiary, in favor of a conditional pardon of any prisoner, but the Board may institute inquiries by correspondence or otherwise, as to the previous history or character of any prisoner.[1]

Like provisions in respect to parole exist in Arizona, Iowa, Michigan, New Jersey, Tennessee, and Texas. In California no oral solicitation of any kind will be heard, but written petitions will be received.

Most states require a convict who petitions for clemency to submit his petition on a prescribed application blank or form. Even if this is not insisted upon the rules governing application for clemency nearly always require that the applicant furnish considerable data so that the pardoning authorities will have preliminary information before they engage in the hearing. An examination of such data as is required in some of the western states will give an idea of the general requirements in this respect in the several states.

In California the application form requires an answer to the following inquiries: Name; prison number; age; nationality; county where convicted; crime; date of sentence; term of sentence; sentence expires; name of judge; name of prosecuting attorney; name of attorney who defended (whether retained by defendant or appointed by the court). If case appealed to Supreme Court, give its number or other designation. Where were you born? Where have you lived? Were you ever before convicted of any crime? If so, state when, where, and what for. What was your former trade or occupation? Have you ever been addicted to the use of liquor, morphine, or opium? Are your parents living? If so, state name, age, and place of residence. Are you married? If so, give name, and place of residence of your husband or wife. Have you any children or other relatives dependent upon you for support? If so, state name, age, and place of residence. Were you living with and

[1] Idaho Revised Codes, 1908, sec. 8263.

supporting your family at the time of your conviction? If not, state reasons. Have you ever made previous application for executive clemency? Give any reasons you may have why you should be granted executive clemency. (Facts to sustain these grounds may be shown by affidavit and appended hereto.)

The application form used in Wyoming is quite similar to that in California, but the following items not in the California form are included in the Wyoming form: Maximum term for crime committed prescribed by law. Minimum term for crime committed prescribed by law. Pleaded guilty or not guilty. Have you made an assault with a deadly weapon upon any officer, fellow convict, or employee while confined? Causes of crime. Present name assumed? If so, true name. Previously lived under assumed name? Where living when under said assumed name? If ever living under assumed name, reason for same. Read; write; where educated; years at school; years at college; religion, religion of parents; degree of attendance upon religious services while in prison; extent of moral training in youth; age when leaving home; legitimate occupation; any knowledge of other trades; if so, what trades.

The following questions in the Oregon form are not found in either the California or the Wyoming form: Were you occupied or idle preceding the commission of your crime? Are you guilty of the crime? What did you plead at the trial? Are you justly imprisoned according to the evidence? What were your relations to the complaining witness? What was his action in the case, fair or otherwise? What is the present attitude of complainant toward you?

Nevada asks: Were you contributing to the support of your dependents, if any, at the time of your arrest, and if so, to whom? Have you contributed to the support of your dependents since your incarceration? Do you communicate with your relatives and, if so, with whom?

With such information as this in their hands the pardoning authorities possess a fair knowledge of the case before the hearing for clemency occurs.

Since a hearing is not only for the purpose of considering reasons for granting clemency, but also to hear reasons why clemency should be refused, it is the rule in most states to insist upon certain requirements which will insure publicity of hearings so that all interested parties may have an opportunity to appear. Some states even go so far as to insert such requirements in their constitutions, while other states make similar provisions in their statutes. In most states provisions exist which require that notice of intention to apply for pardon must be given in a

newspaper printed in the county in which the crime was committed, or, if no newspaper is published in such county, then the information is to be given in a newspaper published in an adjoining county. Also it is common to require that notice of intention to make application shall be posted on the door of the county courthouse of the county in which the applicant was convicted of the crime. A summary of these requirements as they exist in those states where this information is available is here appended.

NOTICE OF HEARING

Alabama.—Notice of hearing to be published for two weeks preceding a hearing in a newspaper published in county where applicant was convicted. If no newspaper is there published then notice is to be posted on courthouse door and in three other public places in the county. A copy of the notice and proof of its publication is to accompany the application. Code, 1907, sec. 7511.

Arizona.—Ten days before action by Board, applicant must give notice to county attorney of county where convicted. Proof of service, by affidavit, must be presented to the Board. Publication of intention to apply, for thirty days in newspaper published in county of conviction, must be made unless dispensed with by governor. These provisions not applicable, (1) in case of imminent danger of death of applicant, (2) when term is within ten days of expiration. Penal Code, 1913, secs. 1304–1306.

Arkansas.—For the more serious offenses, publication twice per week in newspaper in county of conviction. If offense was committed in a different county then publication to be made in both counties. Proof of publication required. Digest Arkansas Statutes, 1916, secs. 2746–47.

For minor offenses application with signers to be posted at entrance to courthouse of county or counties (if crime is committed in one county, and trial occurs in another county) for ten days prior to application being presented to governor. Sec. 2748.

Governor may waive publication if applicant is unable to pay expense of the same. Sec. 2749.

Governor may waive publication in any case, but in such cases application for pardon cannot be made by any attorney or paid representative of person applying for pardon. Sec. 2749.

Presentation of application without compliance with law requiring publication subjects offender to penalty of not less than $100 nor more than $500. Sec. 2750.

California.—Ten days before governor takes action, notice of application to be served on district attorney of county of conviction. Proof of service to be furnished by affidavit. Penal Code, 1915, Sec. 1421.

Unless dispensed with by governor, notice of intention to apply for clemency must be published for thirty days prior in newspaper of county of conviction. Sec. 1422.

The above two sections do not apply when applicant is in imminent danger of death, or within ten days of expiration of sentence. Sec. 1423.

Colorado.—Applicant must present to governor a certificate from warden of state prison showing nature of conduct of applicant while confined. Colorado Statutes, 1914, sec. 2044.

Connecticut.—Notice of petition for clemency to be published in newspaper in county of conviction at least two weeks successively before the regular session of Board. Copy of the newspaper to be filed with clerk of Board. Rules of Pardon Board. Rule 2.

Delaware.—Silent.

Florida.—Notice of intention to apply to be posted for ten days on courthouse door and in two or more other places in county of commission of crime, or to be published for such period in newspaper of said county. One copy of notice to be posted in neighborhood where crime was committed. Proof to be furnished by affidavit that notice has been posted or published. General Statutes, 1906, sec. 4074.

Georgia.—Notice of intention to apply to be posted on courthouse door of the county of commission of crime, thirty days before hearing. Affidavit to be furnished certifying to compliance with this rule. Joint Rules of the Governor and Prison Commission. Rule 3.

Idaho.—Notices of time and place of hearing to be published in newspaper of general circulation at least once a week for four weeks by applicant. Constitution, Art. 4, sec. 7.

Illinois.—Notice of application to be published for three weeks in newspaper in county of conviction. Certified copy of notice to accompany petition. Governor and Division of Pardons and Paroles may waive this requirement. Revised Statutes, 1915–16, chap. 104a, sec. 2.

Indiana.—Calendar of cases to be heard is furnished to local newspapers and to press associations prior to each meeting.

Iowa.—Before presenting application to Board, the governor shall cause notice of reasons assigned why pardon should be granted to be published in two newspapers of general circulation—one at the capital, the other in county of conviction, once each week for four successive weeks; the last publication to be at least twenty days prior to session of Board. Supplement Code of Iowa, 1913, sec. 5626.

Kansas.—Notice of application to be published for two weeks in newspaper in county of conviction. If no newspaper is published in such county then notice of application to be posted on courthouse door. General Statutes, 1915, sec. 6754.

Kentucky.—Silent.

Louisiana.—Notice of application to be given by three publications, covering ten days, in newspaper published in parish where offense was committed. Rules of Pardon Board. Rule No. 2.

Maine.—Notice of application to be given county attorney in county of conviction at least three weeks before hearing; and three weeks' notice to be

given in newspaper published in county of conviction. Revised Statutes, 1916, chap. 140, sec. 1.

Maryland.—Before the governor grants a *nolle prosequi* or pardon he shall give notice in one or more newspapers, of the application made, and of the day on or after which his decision will be given. Constitution, 1867, Art. 2, sec. 20.

Massachusetts.—The attorney-general, district attorney, or justice of police court, depending upon the nature of the offense, shall be notified of hearing upon application for pardon and may be present and examine petitioner's witnesses, and also be heard respecting the application. General Acts, 1917, chap. 266.

Michigan.—Dates of meetings are always advertised by the Board. Any interested party may secure whatever information he wishes upon making application to the secretary of the Board.

Minnesota.—Clerk of Board to give notice of time and place of hearing to trial judge and prosecuting attorney. General Statutes, 1913, sec. 9286.

Mississippi.—Applicant to publish for thirty days before hearing his petition in a newspaper published in county of commission of crime. If no newspaper is published in such county then publication is to be in an adjoining county. Constitution, 1890, Art. 5, sec. 124.

After name is placed on meritorious list, then at following meeting the Board will consider application. But before such meeting applicant must again publish application in some newspaper in county of commission. If no newspaper is published in such county then applicant must post application in three conspicuous places in the county, one of which is front door of courthouse. A sworn affidavit that this has been done must be published. Secretary of Board shall also publish a list of all applications for final consideration in a newspaper for three consecutive weeks published at the capital. Constitution, 1890, Art. 5, sec. 124.

Missouri.—Intention to apply for clemency to be published by applicant in weekly newspaper in county of conviction for two weeks. Affidavit of publication to be furnished. Board may waive requirement of publication if expense would be a hardship, or for other proper reasons. Laws of Missouri, 1917, sec. 137.

Montana.—Notice of time and place of hearing, and of relief sought, to be published in newspaper in county of commission of crime, at least once a week for two weeks by Board. Constitution, 1889, Art. 7, sec. 9.

Proof of publication to be made. Revised Code, 1907, Sec. 9561.

Publication not required if imminent danger of death of applicant, or if term expires in ten days. Sec. 9570.

Notice of time and place of hearing to be mailed to trial judge, county attorney, and sheriff of county. Sec. 9560.

Nebraska.—Notice of time and place of hearing to be given to trial judge and prosecuting attorney at least fifteen days before the hearing. Laws of Nebraska, 1913, sec. 10569.

New Hampshire.—Written notice of hearing to be given state's counsel, and to such others as the governor may direct. Public Statutes, chap. 20, sec. 3.

New Mexico.—Silent.

North Carolina.—Notice of application to be published at least two weeks in conspicuous place in newspaper published in county of commission of crime. If no paper is published, notice is to be posted on courthouse door and post-office at county seat, and at post-office nearest where crime was committed. Affidavit of publication or posting to be furnished. If there was a private prosecutor in the case, he or his attorney must be specially notified. Rules Governing Application for Pardon. Rules 3 and 4.

North Dakota.—Clerk of Board shall notify trial judge and prosecuting attorney of time and place of hearing. Compiled Laws, 1913, sec. 11105.

Ohio.—Notice of application for pardon must be given by applicant to prosecuting attorney three weeks before hearing. Proof of such notice must be submitted. Notice of application with data to be published in newspaper in county of commission three weeks before consideration of petition. Governor may modify this requirement in case of capital punishment or of imminent danger of death.

Oklahoma.—Notice of hearing to be published in newspaper of general circulation in county of commission of crime for thirty days before the hearing.

Oregon.—At least twenty days before application is made written notice of intention to apply, and stating grounds therefore, must be served by convict upon district attorney of the county of conviction. Proof of this must be furnished by affidavit. Lord's Oregon Laws, 1910, sec. 1721.

Pennsylvania.—Notice of intention to apply for clemency to be given to trial judge, prosecuting attorney, warden of prison, mayor, and head of police department in city of conviction at least ten days before meeting of Board. Affidavit that such notice has been given is to be furnished.

Notice of intended application to be advertised once a week for two consecutive weeks in newspaper published in county or city of conviction. Pardon Board Rules. Rule 4.

Rhode Island.—Before parole board acts the attorney-general must be given an opportunity to be present. Session Laws, 1915, chap. 1186, sec. 8.

South Carolina.—Petitions for clemency are referred to state's attorney who prosecuted, and to judge who presided at trial.

South Dakota.—Notice of application to be given prosecuting attorney thirty days before application is filed with governor. Such notice to be certified to. Notice of application to be published once a week for four successive weeks in newspaper in county of commission of crime. If no newspaper is published then notice to be posted in conspicuous place on door of county courthouse for four successive weeks prior to hearing. Affidavit to this effect to accompany application. Any person opposing the granting of clemency may appear at hearing. The above requirements do not apply to pardons granted thirty days before prisoner is entitled to discharge. Compiled Laws South Dakota, 1913, Vol. I, Political Code, Art. 5, sec. 229.

Tennessee.—Silent.

Texas.—Silent.

Utah.—Secretary of Board shall cause notice of applications to be published once a week for two consecutive weeks in newspaper published or circulated in Salt Lake City. Secretary shall mail notice of hearing to prosecuting attorney, and, except in case of indeterminate sentence, to trial judge for information, and also to warden of state prison. Board of Pardons. Rules 6 and 7.

Vermont.—Governor to give notice of hearing to applicant and to prosecuting attorney. Governor may publish the decision reached. Public Statutes, 1906, secs. 6125, 6127.

Virginia.—Opportunity is always given when a person desires to be present and heard.

Washington.—Silent.

West Virginia.—Applicant must give notice of intention to apply, once each week for two successive weeks in newspaper of general circulation published in the county where applicant was indicted. Proof of publication to be furnished. Rules Governing Pardon Attorney.

Wisconsin.—Notice of application for pardon shall be given trial judge and prosecuting attorney three weeks before application is filed. Acknowledgement of such receipt by judge and prosecuting attorney is to be filed with application. Notice of application for pardon to be published at least once a week for two successive weeks in newspaper in county of commission of crime. If no newspaper is published there, then notice to be posted on county courthouse door for three weeks prior to application, and to be published once each week in newspaper published in adjoining county. Affidavit to this effect to accompany application. Wisconsin Statutes, 1915, sec. 4856. (Laws of 1919 provide this section be renumbered as sec. 57.09.)

Wyoming.—Notice of application for pardon to be given prosecution attorney at least three weeks before application is considered. Such acknowledgement to accompany application. Notice of application to be published in newspaper in county of commission of crime. If no newspaper is printed there, then notice to be posted on door of county courthouse three weeks before consideration of application. Affidavit to this effect to accompany application. When capital punishment is to be inflicted such notice shall only be required to be served and published for ten days before consideration of application. Foregoing provisions not applicable in cases of imminent danger of death of applicant, nor if warden and officials of penitentiary unite in recommending pardon of the applicant. Compiled Statutes, 1910, sec. 559.

These provisions insure that notice of hearing shall be given to the public so that it may submit reasons, both favorable and unfavorable, in regard to granting the clemency petitions that are to be considered. In many states it is felt also that a statement of facts should be secured

from the trial judge and the prosecuting attorney in each case under consideration. Over half of the states have provisions which either require these officials to submit a statement of the circumstances connected with each case wherein a defendant is found guilty on a criminal charge, or else such provisions allow pardoning authorities to call upon trial judges and prosecuting attorneys to furnish the desired information in each clemency case that is under advisement. As a result of these various provisions and requirements the pardon authorities in the American states are provided with facilities for obtaining needed information, and the public is furnished the opportunity to contribute any information which is germane or vital to any case of clemency to be taken under consideration.

CHAPTER IV

ADMINISTRATION AND OPERATION OF PARDON AUTHORITIES—*Continued*

Having concluded a study of the requirements preliminary to the holding of a clemency hearing attention may next be directed to the manner in which hearings are conducted in the various states.

OPEN OR CLOSED HEARINGS

Whether a hearing shall be an open one or a closed one is a matter on which practice is not uniform. Open hearings are held in Alabama, Connecticut, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, South Dakota, Utah, Vermont, Virginia, and Wisconsin. On the other hand closed hearings are held in Arkansas, California, North Dakota, Oregon, and Wyoming.

In Colorado the hearings are regarded as open but only interested parties may appear, the press and the curious public being excluded. The rules of the Iowa Board of Parole, which is also an advisory pardon board, provide for an open hearing but the chairman of the Board reports that they are closed. Massachusetts holds closed hearings except when the Board considers that the petitioner or the public may be benefited by an open session. In Ohio informal hearings are held. An open hearing is granted in Oklahoma if demanded by the parties resisting the granting of clemency. In Rhode Island the Parole Board, which deals only with applications for parole, is not required to hold either a public or a private hearing. Likewise the Tennessee Parole Board does not hold hearings since it is forbidden to receive communications or to hear arguments for or against the recommending of clemency. This latter statement also applies to the Texas Board of Prison Commissioners, which is a parole board. In West Virginia the pardon attorney is forbidden by the rules governing application for clemency to hear oral arguments.

In those states which hold open hearings it is customary for the board or other authority, after all evidence has been presented, to go into executive session for the purpose of considering the evidence and reaching a conclusion. But although this is the usual method there are occasional

instances in Utah and other states in which decisions are reached and announced in open session.

TESTIMONY SUBMITTED UNDER OATH

An interesting study is that of noting to what extent the hearings of pardon authorities approach the methods and procedure which prevail in criminal trial courts. On this point it may first be pointed out that in most hearings the evidence presented is not submitted under oath. An exception to this prevails in Alabama, Connecticut, Iowa, Massachusetts, New Hampshire, Pennsylvania, and Wisconsin. In these states witnesses are sworn. In Idaho a false statement in the application for clemency constitutes perjury.

Practically all pardon authorities have the power to administer oaths but most of them consider it unnecessary or inadvisable to do so. In Louisiana when an application for clemency is based on material facts, sworn proof of such facts must accompany the application. In Maryland evidence is submitted under oath as a rule, but this is not required in the case of the trial judge or state's attorney when they are present and offer testimony. In Vermont evidence is not given under oath but it is verified before it is accredited. From this summary it would appear that the practice of requiring that evidence be submitted under oath is confined principally to the New England group of states.

FORMALITY OF PROCEDURE

The manner in which hearings are conducted depends upon the rules of the Board or other authority, and the degree to which such rules are applied. In general it may be said that no hearing is conducted in as technical a manner as is a criminal trial in a court of the land. Little or no attention is given to the matter of the law of evidence. Testimony is usually presented in a purely informal manner. But in some states it would appear that hearings are a little more technical in character than in some others. In Massachusetts it is said that the procedure in hearings is similar to that in judicial courts but that it is more liberal. In Pennsylvania the rules of judicial courts are followed but in modified form. In Connecticut an approach is made toward judicial procedure. On the other hand in a number of states such as Ohio, Oklahoma, and Iowa the hearings are very informal and not like those of courts of record.

In California a hearing is not regarded as a trial but merely as an opportunity to consider evidence already submitted. Likewise in

Colorado a hearing is not looked upon as a trial and few rules govern the procedure. The Colorado Board usually does not have a transcript of evidence before it, because no transcript is prepared except in those cases carried to the state Supreme Court. In general the proceedings before pardon authorities are very informal and unhampered by technical rules as to the submission of evidence

This is further indicated by the fact that in few states are full stenographic reports made of the proceedings In so far as can be determined such stenographic reports are obtained only in Alabama; in Georgia; in Illinois as the work is now being done, but not prior to July 1, 1917; in Massachusetts where such a copy of each hearing goes with the Board's recommendations to the governor; in Nebraska; in special cases in Maryland; and of important evidence in Vermont. But in all states a clerk or secretary makes a record of conclusions reached, and some state statutes require that important evidence be reduced to writing

SCOPE OF INQUIRY

Does the pardoning authority confine its examination to facts and conditions that were unknown at the time of trial and sentence, and that have arisen since, or does such authority permit each case to be examined from all aspects so as to review the entire past history of the crime and of the applicant? In the great majority of states there is no limitation as to the scope of the inquiry. Anything that is considered of value is regarded as germane. Therefore the complete career of the criminal, and the disposition of the case, are open to investigation. But the policy in some few states is that of restricting the nature of the inquiry

For instance, what should be the relation of the pardon authority to the courts which have found the applicant guilty and pronounced sentence? Should the pardon authority act as a court of review of the trial courts and the appellate courts of a state? Should the pardon authority presume to grant clemency because of any incorrectness, or irregularity, or illegality of proceedings in the trial courts? In several states such as Colorado, Georgia, Idaho, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Virginia, and Wyoming clemency is granted for these reasons if it is considered that justice demands it.

It is said in Connecticut that:

It has been the reasoning of the Board that if a man was defended by counsel and had full opportunity to present all the testimony that he could

find to assist him in open court and the evidence was heard by twelve men, whom we must assume to be fair-minded men, on the jury, their conclusions ought not to be disturbed unless some special meritorious reason has developed since the trial to warrant clemency.

The Pardon Board in Indiana does not believe it is its function to weigh evidence, or release men because of errors and irregularities occurring in the trial court. Yet an occasional case arises where these matters are gone into and considered, and their existence is the determining factor in causing the Board to recommend clemency. Likewise in Maine clemency is not granted for these reasons unless the evidence raises a doubt as to the guilt of the accused, or the sentence seems excessive and the merits of the case under all circumstances warrant clemency. In Maryland the case is not tried anew. The verdict is considered to be justified unless new evidence has been discovered. Governor Harrington granted no pardons because of error or irregularity in the trial court. Clemency is granted very seldom for these reasons in North Carolina and Wisconsin. In South Dakota it has not been done in the last ten years. Ohio, Michigan, and Nevada make no effort to review or impugn court decisions. In California[1] and West Virginia[2] when an application for clemency is based on a mistrial or improper conviction, the allegation must be sustained by such reasons and evidence as would probably be ground for a new trial, and in California cause must be shown why a new trial was not applied for and obtained.

But a few states have gone farther and by statutory enactment have prohibited absolutely their pardon authorities from reviewing or passing upon the correctness, regularity, or legality of the proceedings in the trial court. In Massachusetts

> The said board (Advisory Pardon Board) shall not review the proceedings of the trial court, and shall not consider any questions regarding the correctness, regularity, or legality of such proceedings, but shall confine itself solely to matters which properly bear upon the propriety of the extension of clemency to the applicant.[3, 4]

[1] Rules Governing Applications for Executive Clemency. Rule No. 4 (California).

[2] Rules and Regulations Governing the Pardon Attorney. Rule No. 11 (West Virginia).

[3] General Acts of Massachusetts, 1917, chap. 266, sec. 5A.

[4] "Likewise the Board is forbidden to review the proceedings of the trial court. While in almost every case the Board, if it had the discretion, would doubtless refuse to review the proceedings of the trial court, it is difficult to see how an applicant for

Similar statutes exist in Nebraska[1] and Illinois[2] which prohibit the pardon authorities from reviewing the action of trial courts.

In a few states an attempt has been made to determine the kind of evidence that shall be submitted, and even in some instances to lay down rules for the weighing and evaluating of evidence. In Nebraska and New Mexico the investigation is usually limited to the latest evidence—to facts that have been learned since conviction. In Wisconsin the governor may consider all phases of a case but Governor Phillipp refused to grant a pardon on the ground of innocence unless new and convincing evidence that could not be produced at the trial was presented.

In California if applications are based upon newly discovered evidence, the evidence must be such as would probably have produced an acquittal on a second trial. Should the trial judge, prosecuting attorney, or any of the jurors recommend clemency a statement should be secured from each "giving the newly discovered facts, or altered or extenuating circumstances which have produced the change in his opinion since the trial. The governor will not consider the signatures of these officers entitled to any more consideration than those of other persons, unless such reasons are given "[3]

Similarly in Georgia "requests of trial jurors for modification of their verdicts should be made under oath, and cannot be esteemed as having much weight unless they swear that facts brought to their attention subsequent to the trial are convincing to them that their verdict was in error."[4]

The rules in Illinois provide that

> Newly discovered evidence, or facts and circumstances occurring subsequent to the conviction will be considered by the Division of Pardons and Paroles. To entitle newly discovered evidence to be received the same shall be accompanied by a statement from the state's attorney that the same was not heard on the trial of the cause, which evidence and statement shall be filed with the clerk of the Division of Pardons and Paroles, and such alleged

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pardon could establish his innocence without some review of the proceedings of the trial court; and the establishment of innocence in the opinion of the Board entitles a man to a pardon as a matter of right."—*Report of Massachusetts Board of Parole* (1919), p. 21.

[1] Revised Statutes of Nebraska, 1913, sec. 9170.

[2] Revised Statutes of Illinois, 1915–16, chap. 104a, sec. 10.

[3] Rules Governing Applications for Executive Clemency in California. Rules 4 and 8.

[4] Joint Rules of the Governor and the Prison Commission Governing Application for Executive Clemency. Rule 4.

newly discovered evidence shall be taken in accordance with the statute of this state relating to depositions in chancery; and notice of the time and place for the taking of the same shall be given by serving a copy of such notice upon the state's attorney of the county wherein the defendant was convicted. Evidence of facts and circumstances occurring since the trial and conviction may be presented by affidavit, the officer before whom the affidavit is made certifying that the persons making the affidavit are respectable persons, whose testimony is entitled to credit. . . . . Provided, that official statements of matters of fact made by officials of the prison need not be sworn to.[1]

A rule very similar to the above in Illinois is also followed in Iowa.[2] In West Virginia when an application is based on newly discovered evidence, the evidence must be such as would probably have produced an acquittal on a second trial, and must be certified by the prosecuting attorney and the trial judge as germane, and an opinion given by them as to its credibility.[3]

In applications in Washington based upon the grounds of a mistrial or improper conviction, the allegations must be sustained by such reasons and evidence as would have been good ground for a new trial; and in applications based upon the ground of newly discovered evidence, the evidence must be such as would, in all probability, have produced an acquittal on a second trial; and where the court has overruled any motion for a new trial, based upon any of the foregoing grounds, such questions will not be reconsidered, except on the recommendation of the judge before whom such motion was heard.[4] In Kansas and West Virginia applications for clemency will not be considered pending an appeal of the case to an appellate court.

It is apparent that there is some limitation on the kind and nature of evidence presented before pardon authorities, but one may conclude in general that in most states a hearing offers opportunity for the presentation of any kind of evidence, unhampered by legal technicalities as to its admissibility, and that such evidence is not received under oath.

ATTENDANCE OF WITNESSES

Another question in connection with hearings is whether pardon authorities can compel the attendance of witnesses and force them to testify. There seems to be a striking diversity on this matter in the

[1] Rules and Laws Controlling the Division of Pardons and Paroles, etc. Rule 4.

[2] Rules of the Iowa Board of Parole. Rule 24.

[3] Rules and Regulations Governing the Pardon Attorney. Rule 11.

[4] Rules of Executive Practice in Relation to Pardons. Rule 4, p. 23 (Washington).

several states. In the following states the pardoning authority does possess this power: California, Colorado, Connecticut, Delaware, Idaho, Indiana, Maryland, Massachusetts, Minnesota, Nevada, New York, North Carolina, Utah, Vermont, and Wyoming. On the other hand, in the following states the pardoning power cannot compel the attendance of witnesses nor force them to give testimony: Alabama, Arkansas, Georgia, Illinois, Iowa, Michigan, Nebraska, New Mexico, Oklahoma, Pennsylvania, and South Dakota. Virginia can compel attendance of witnesses in some cases only. It would appear that this authority is possessed by the pardoning power in North Dakota, Oregon, and Wisconsin, although it seems that it has never been used and that there is no occasion for its use. The latter part of this statement applies also to most of the states in the first group for it appears that witnesses are not subpoenaed nor compelled to give testimony, although in South Carolina the board may punish for contempt in its presence.

"EX PARTE" HEARINGS

Hearings are attended by those who are interested. This means that those usually present are attorneys and witnesses seeking clemency for those criminals whose petitions are under consideration. Although, as noted above, a number of states require that public notice of the hearing be given, yet the public is otherwise occupied. It does not make it a point to be present to offer objection to the granting of clemency. Even though a number of states such as Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, Utah, and others notify the prosecuting attorney, and he enjoys the privilege of appearing in order to protest if he so desires, yet in nearly all states the hearings are *ex parte*. In Connecticut and Pennsylvania a state's attorney is present, and in Wisconsin a representative from the attorney-general's office sits with the governor at hearings and advises him.

The general assumption is, however, that the pardoning authority sits not only as a judicial body to weigh evidence, but also safeguards the interests of the state. But where this double duty is thrust upon the board or other pardoning authority there is a chance for too much leniency to be extended. Such a view as this is encountered in Oregon where, in the past, clemency has been freely granted. As a result of this situation a tendency has manifested itself in some states toward a division of point of view on the part of different members of the board. In those boards of which the attorney general is a member, this official often regards himself as the protector of the interests of the state rather

than as an unbiased officer who listens to both sides. He feels that there is but one side being presented and therefore it is incumbent upon him to oppose. Thus in Idaho the impression was obtained from several official sources that the attorney general was the "hard-hearted" member of the Board; and inmates in the state prison expressed themselves to the effect that the road to freedom would be much easier if it were not for this member of the Board. A similar view was also obtained in Utah, in fact this official admitted it and criticized other members of the Board for their lenient attitude toward petitioners for clemency. In Nevada it is generally felt that those members of the Board who belong to the legal profession are less inclined to grant clemency than other members. But the reply secured from those members under criticism is that a hearing is not a trial and therefore trial methods and procedure are unnecessary.

APPLICANTS REPRESENTED BY COUNSEL

In most states petitioners for clemency may be represented by counsel. Attorneys may either appear in person or file briefs in clemency hearings in Alabama, Arkansas, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. In Connecticut counsel is limited to fifteen minutes for presentation of questions of fact; in Iowa oral arguments or statements are not to exceed thirty minutes except by special permission; in Colorado statements of counsel are to be brief and short; the same is true in Utah. In Pennsylvania

> except in capital cases, not more than fifteen minutes will be allowed applicant for presentation and argument of his case in chief, unless by special leave; and a like period for the representation of the Commonwealth in opposition; and reasonable time will be allowed the applicant to reply.[1]

Also in this state petitions for rehearing, except in capital cases, will be considered by the Board only on papers filed in the nature of briefs, and no oral argument will be heard except by special leave.[2]

But in spite of this general permission for counsel to represent an applicant for clemency, there seems to be a feeling among many pardon authorities that no good purpose is served by allowing professional

[1] Rules of Board of Pardons (Pennsylvania). Rule 13.

[2] Rules of Board of Pardons (Pennsylvania). Rule 7.

counsel to become involved in clemency cases. The Ohio Clemency Board makes this statement:

> Prisoners make their own applications for pardon, and the only necessary outlay of money, to the applicant, is the small item for legal advertising. Use of money is discouraged and prisoners are informed its use will militate against them.[1]

Likewise the Michigan Advisory Board says:

> It is inadvisable and nothing will be gained by a prisoner or his relatives or friends expending money in the employment of attorneys or other representatives to draw papers or to appear before the Governor or the Board of Pardons. All cases will be given equal consideration and action will be taken as promptly as possible.[2]

In West Virginia no oral arguments will be heard by the pardon attorney. Each case must be complete in the written papers submitted.[3]

A personal investigation in a group of western states reveals the fact that there is a strong antipathy toward the injection of professional attorneys into clemency cases. Colorado limits their time for argument considerably; California, like West Virginia, refuses to permit oral argument. In Idaho it is said that a few attorneys tend to specialize in this kind of work, especially one attorney who is an ex-convict. As a result attorneys engaged in this phase of practice are *persona non grata* in Idaho. In Utah not more than fifteen minutes are allowed for the oral presentation of an application. Judges of the Supreme Court, who are members of the Board in this state, say the appearance of counsel is not encouraged, and that a case is not helped thereby. A former governor of the state, who was chairman of the Board for eight years, makes a similar statement. A former attorney-general, also a member of the Board in this state, says that the Board is rather suspicious of some attorneys who misrepresent facts.

In Nevada the Rules of the Board of Pardons provide that

> Attorneys shall first present their evidence through witnesses, affidavits, the records or documents, and then argue their cases concisely and not exceeding one-half hour for each counsel appearing, unless additional time be granted by the Board, and in the event that an attorney digresses from the evidence, or states facts not supported thereby, or reiterates in his argument, he shall

[1] *First Annual Report of Ohio Board of Clemency* (1918), p. 10.

[2] Rules and Regulations Governing the Paroling of Prisoners (Michigan). Rule 15, p. 24.

[3] Rules and Regulations Governing the Pardon Attorney (West Virginia). Rule 14.

be called to order. Papers shall be filed separately, or attached before they are read in evidence, and shall not be withdrawn without the order of the Board.[1]

Although the Rules provide for the appearance of counsel, the secretary of the Board says that legal arguments are discouraged. This statement is further explained by the governor of Nevada who says, "There used to be a group of attorneys who specialized in obtaining pardons and who pestered the life out of the Board. This group has been broken up."

In Nevada it is also provided that

The money allowed by the State to a prisoner upon his discharge is solely for the purpose of aiding him until he can find employment, and must not be used for attorney's fees to employ counsel to present his case to the Board of Pardons or Parole. Prisoners shall not pay, or agree to pay any portion of their discharge money for services of an attorney to present their case, nor shall any attorney accept or receive, directly or indirectly, any portion of said money for such services.[2]

The Rules of the Parole Board in Oregon provide that attorneys and persons not acquainted with the facts and circumstances of a case under consideration shall not be heard in an application for parole or pardon referred to the Board by the governor.[3] For this reason oral arguments are not made by attorneys in Oregon but sometimes written briefs are presented. The Board aims, however, to exclude all attorneys from any relation with clemency cases. As the Governor's secretary says, "They are not wanted."

Montana provides that no prisoner shall be permitted to pay out any money belonging to him and in the possession of the prison warden, for the purpose of employing counsel to assist in obtaining pardons or paroles, or to employ counsel in any other capacity without first obtaining permission of the Board of State Prison Commissioners.[4]

Kentucky has probably gone farther than any other state in excluding attorneys and others from aiding convicts to secure clemency. The statutes of that state provide,

If any person shall for fee or reward, or promise thereof, aid or assist in procuring the governor to grant or refuse a pardon, remission or respite of any punishment or fine, he shall be fined not less than $25.00 nor more than $500.00.[5]

[1] Rules of the Board of Pardons, etc. (Nevada). Rule 12.

[2] Rules of the Board of Pardons, etc. (Nevada). Rule 14.

[3] Rules of the Parole Board (Oregon). Rule 22.

[4] Rules for the Government of State Prison (Montana). Rule 118.

[5] Kentucky Statutes, 1915, sec. 1370.

It is evident that the appearance of counsel in clemency cases is not desired in a number of states. This is shown by legislation of the character above indicated, and by the statement of some boards that employment of counsel will not help the cause of any criminal. But in spite of this there is room to question if the appearance of a capable attorney, of high integrity and governed by professional ethics, is not of distinct value and service to an applicant for clemency. An observer at clemency hearings who notes the illogical, unsystematic, and haphazard manner in which pleas are made by uneducated, poorly prepared, and frightened relatives and friends in behalf of applicants cannot help feeling that the cause of the applicant is often poorly presented. If, in the place of these persons, a capable and conscientious attorney could take charge of the case, present evidence systematically, and logically argue the cause of the applicant, there is reason to believe that the authorities would be in possession of fuller evidence than is now the case in many states.

REHEARINGS

There is a type of criminal who is constantly seeking his liberty. Either he in person, or friends and relatives in his behalf, are continually soliciting pardon authorities for clemency. If his application is denied he is not materially discouraged but persistently sets to work again to bring his case before these authorities. Usually the merits of the case have been gone into at the first hearing. Yet, without any new evidence or other reason for a reconsideration he hopes that success will at last reward his efforts. To prevent too frequent reapplication in such instances, which serves no useful purpose and only consumes the time of the pardon authorities, these officials in some states have felt compelled to limit the privilege of asking for a rehearing.

In Arizona, Louisiana, Pennsylvania, Utah, West Virginia, and Wyoming an application for a rehearing may not be filed within six months of the refusal of a previous application. Pennsylvania makes an exception in capital cases, however, but adds that new and substantial grounds or reasons must be given to warrant a reconsideration. Such reconsideration will be in the form of an examination of briefs only. No oral arguments may be presented. In Utah the Pardon Board may grant a rehearing based on special reasons, within less than six months from the previous hearing. In West Virginia and Wyoming new and material facts must also be submitted to justify a reconsideration. Of course the pardoning authorities possess full discretion in determining whether new and material evidence has been submitted.

In Georgia, Michigan, Mississippi, and Nevada a reconsideration cannot take place within a year of a previous hearing. This statement is qualified in the case of Georgia by the addition "unless new facts come to light," and in Nevada by the statement "without the consent of the majority of the Board."

In Colorado a prisoner cannot again make application for executive clemency until the expiration of two years from the date of the last hearing except at the request of the governor or a member of the Board of Pardons.

Some states do not fix any time limit before applications for a rehearing may be made, but provide other requirements which must be met before a reconsideration will be granted. California provides that no application refused by the present or a preceding governor will be reconsidered unless substantial grounds for reopening the case are formally presented. But any case may be reconsidered upon the recommendation of the Board of Prison Directors.

In Illinois applications for rehearing will be considered upon the following conditions only:

> Four copies of the petition therefor shall be filed with the clerk at least ten days preceding the first day of the term. Such petition shall set forth the grounds upon which the application is made, provided, that the governor may in his discretion remand any case to the Division of Pardons and Paroles and order a rehearing thereof, which shall be had.[1]

If an application is once denied on its merits in Minnesota, no subsequent application may be filed without the consent of two members of the Pardon Board. In North Carolina a reconsideration will not be permitted unless new facts are submitted.

In a number of states such as California, Illinois, Nevada, North Carolina, and Pennsylvania the requirements concerning notice and publication of hearing must again be complied with before a rehearing is granted.

FILING OF ACTION TAKEN IN CLEMENCY CASES

It is a constitutional or statutory requirement in the great majority of states that the governor shall submit to the legislature at each regular session a list of persons to whom clemency has been extended, together with other data concerning each one. Kentucky, Louisiana, Minnesota, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Tennessee, Texas, and Vermont seem to be the only states where this

[1] Rules Controlling Applications for Pardons (Illinois). Rule 5.

is not required. But in Kentucky the governor must file a statement of his reasons which is open to public inspection. In Pennsylvania the recommendation and reasons of the Board are to be filed in the office of the secretary of the commonwealth. In South Carolina, if the governor does not adopt the recommendations of the Board he must submit his reasons to the General Assembly, whereas such action is not required if he does adopt the Board's recommendations. In South Dakota, where the pardoning power is divided between the governor and the Pardon Board, the governor must report his actions to the legislature, whereas the action of the Board is filed in the office of the secretary of state. In Texas the governor does not report to the legislature but files his reasons in the office of the secretary of state.

In most of the states requiring these reports it is also a constitutional or statutory provision that the reasons for granting clemency shall be stated. It appears that only in Indiana, Kansas, Louisiana, Nevada, New York, and Oklahoma no statement of reasons is required to accompany the report of the pardoning authority.

PARDON UNDER SEAL

The method of officially authenticating the action of pardon authorities in granting clemency varies in different states. In Alabama, Arizona, Arkansas, California, Colorado, Georgia, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Nebraska, Nevada, Pennsylvania, South Dakota, Utah, Vermont, and Virginia the grant of clemency is under the seal of the state countersigned by the secretary of state. In Connecticut, Minnesota, and North Dakota the pardon board has its own seal with which the board attests its action. The State Prison Board of Missouri also possesses a seal of which all courts are required to take judicial notice. In Rhode Island the Parole Board must affix its seal to paroles which must be signed by the governor and countersigned by the secretary of state.

In Iowa clemency is granted under the seal of the governor with his signature attached. In North Carolina it is granted under the seal of the state but countersigned by the private secretary of the governor instead of the secretary of state.

In Idaho, New Hampshire, and Wyoming pardons, when granted, are not under seal.

In no state where the countersigning of the secretary of state is required does this official have any discretionary power in the matter. His signing is regarded purely as a ministerial act.

RELATION OF GOVERNOR TO ADVISORY BOARD

An interesting problem in administration is one involving the relation of the governor to the advisory pardon board. Does the governor closely follow the recommendations of the board, or is he inclined to rely upon his own judgment? Does the board relieve him materially of the burden of work of this character through his general acceptance and acquiescence in its recommendations, or does he assume that he must investigate independently of the board and act in the light of his own investigation? In those states where there is no advisory authority, or where the governor is merely a member of the board, and clemency can only be granted through board action, this problem does not arise. But in many states where the board is advisory in character and the governor possesses final authority to act, the question of actual administration is a vital one. Furthermore the policy in this regard in any state may be a fluctuating one since each governor may have different views in this matter.

In Arizona the governor does not always follow the recommendations of the Board of Pardons and Paroles. There are several instances where the governor has refused to follow the recommendations of this board. It is the custom of Governor Campbell thoroughly to investigate every case placed before him and if, in his judgment, the interests of justice and society will not be subserved by the release of the prisoner he takes negative action in spite of a favorable report of the Board. In Alabama clemency is not granted as a rule unless the Pardon Board recommends it.

In California the governor, it is said, sometimes acts contrary to the advice of the Board. Likewise in Colorado he does "but very seldom indeed." In Georgia no application for clemency is granted by the governor if the Advisory Board refuses to recommend it, except in capital cases. In cases that are recommended for clemency the governor considers the facts of each case, such as the circumstances of the crime, the length of imprisonment, deportment of the convict, the prisoner's reputation previous to the commission of the crime, the attitude of the trial judge and the solicitor-general. He decides each case on its own merits and occasionally acts contrary to the favorable recommendation of the Board.

Approximately five hundred applications for pardon or commutation of sentence are heard each year by the Division of Pardons and Paroles in Illinois. Favorable recommendations are made to the governor each year in about twenty cases at the penitentiaries, and in about the same

number of cases from the bridewell. The governor never grants clemency contrary to the recommendation of the Division of Pardons and Paroles, at least Governor Lowden never did, and Governor Small does not.

In Indiana the recommendation of the Board of Pardons is regarded as final by the governor of the state. Governor Goodrich approved every recommendation during the first three years of his term of office, and the prior governor, during his four-year term, adopted the Board's advice in all but two cases. It is said, however, that only about one-third of all clemency petitions in Indiana are referred to the Board by the governor.

Governor Sleeper of Michigan referred all applications for clemency to the Pardon Board for its investigation and report. The cases were usually discussed with the governor before the Board made any recommendation and, as a result, all of its recommendations were concurred in by the governor. There seem to have been instances in which he and the Pardon Board were not agreed at the outset, but they always reached an agreement before a final disposition was made of such cases. It is asserted that during a prior Democratic state administration the governor granted clemency contrary to the recommendation of the Board.

Governor Bilbo of Mississippi referred all pardon petitions to the Board of Pardons. All favorable recommendations of the Board were granted by him, and no grants of pardon were made by him contrary to the advice of the Board. In Nebraska Governor McKelvie has granted clemency contrary to the advice of the Board, or the Secretary of the Department of Public Welfare who has replaced the Board, but only in very exceptional cases. In this state more than 90 per cent of the applications for clemency are referred by the governor to the Department of Public Welfare.

In New Hampshire the governor cannot grant a pardon without the consent of the Council, but he may refuse to grant a pardon by refusing to refer a clemency petition to the Council. The governor of North Carolina seldom grants clemency contrary to the recommendations of the Board. In Oklahoma it is only in rare instances that the governor acts contrary to the advice of the pardon attorney. The governor of Oregon sometimes acts independently of the Board and even contrary to the suggestions of the Board.

The governor of Pennsylvania does not grant clemency contrary to the recommendations of the Pardon Board since such action is prohibited

by the state constitution. He may, however, refuse to pardon in cases recommended favorably by the Board, but this is very rarely done—in less than 1 per cent of such cases.

Governor Cooper of South Carolina referred all clemency petitions to the Board of Pardons. He usually adopted the recommendations of the Board, though in some cases—not to exceed 20 per cent—he did not. In no case did he grant clemency when the Board's reports were against such action, but in some instances he did not grant clemency even though the Board recommended it.

Very nearly without exception all applications for clemency are first passed upon by the Advisory Board in Texas. In case the application is presented to the governor first, it is in most instances referred to the Board for investigation. In almost all cases the governor follows the recommendations of the Board—in a few instances this is not the case. Whenever clemency is recommended by the Board it is authorized by the governor, but there are a few cases in which he has granted it contrary to the advice of the Board of Pardon Advisers. In Wyoming a few pardons in the past have been granted without the consent of the Pardon Board.

From this summary of the relation of the governor to the advisory pardoning authority it would appear that in some of these states the governor occasionally disregards the advice and recommendation of the advisory board. But such disregard is exceptional and unusual. In the great majority of cases acted upon the governor follows the suggestion of the Board. This would seem to indicate that advisory pardon authorities do function and that state governors rely almost entirely upon their recommendations.

POLITICAL INFLUENCE AND ABUSE IN GRANTING CLEMENCY

An attempt to determine whether the pardoning power has been abused in the several states, and whether political pressure and manipulation have been brought to bear in order to secure clemency, has met with indifferent success. Press accounts have occasionally heralded the fact that certain governors have been emptying the state prisons on various pretexts, and no doubt there have been sporadic instances in the not far past in different states in the Union. It is still remembered that Governor Donaghey of Arkansas pardoned 396 prisoners at Christmas, 1912, as a rebuke to the convict-labor system of that state.[1]

The unwise and undiscriminating exercise of clemency by Governors Blease of South Carolina, Comer of Alabama, and West of Oregon has

[1] *World's Work*, XXV, 382.

led many to believe that this power has been scandalously abused in this country. When Governor Dix of New York pardoned Albert T. Patrick without consulting Recorder Goff, the trial judge, or the prosecuting attorney, it produced a wave of dissent and caused the *Outlook* to say, "The history of the Patrick case seems to us to make it very clear that no one man, whether he be governor of a state or President of the United States, should have vested in him, without any check or supervision, the power to pardon criminals."[1] Isolated instances such as these can be cited as evidence of the failure of our system of clemency, but they fail to answer the question whether our system is a failure because of constant abuse, or whether these are sporadic instances.

It is far more difficult to determine whether there has been a constant but less spectacular abuse which has been deliberate in character. A personal attempt to secure such information from the several states has not resulted in that degree of success which would justify positive convictions in the matter. It is a problem which cannot be proved from statistics entirely but must rest upon individual opinion and judgment. In California, Connecticut, Iowa, Illinois, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Vermont, and Virginia pardon authorities assert that there has been no abuse of clemency. In Colorado, Georgia, Maine, Michigan, and Oklahoma it seems to be a matter of difference of opinion as to whether there has been abuse in the extension of clemency. In Alabama there is a feeling that perhaps there has been some abuse but that it has not been flagrant. In Arkansas admission is made that there has indeed been serious abuse in the past. A belief exists in Idaho that some previous Pardon Boards have been too lenient.

Pardon authorities in Indiana assert that there has been no recent abuse in that state. This statement is challenged by a speaker before the Democratic Editorial Association in Fort Wayne, July 3, 1919, who said:

> We further charge Governor Goodrich with flagrant abuse of executive power in the pardoning and paroling of convicts and the consequent disrespect for the judgments of the courts of Indiana, all as shown by the records on file in the secretary of state's office. Governor Goodrich in two and one-half years has released more convicts from prison sentences than were released during the combined terms of Governors Marshall and Ralston. The records in the secretary of state's office show that he has released 670 convicts, but that record is not complete, for the reason that Governor Goodrich has inaugu-

[1] *Outlook*, CII, 791.

rated a system of "temporary paroles" unknown to either law or reason, and of which no account is kept, and of which there is no way of checking up the personal and political favorites whom he has released under this unique and unknown procedure. . . . . No wonder the *Indianapolis News* cries out in surprise "that a man competent to be Governor of Indiana should let himself be persuaded by lawyers or others, or through political influence, to use his pardoning power so freely."[1]

In North Dakota there was some complaint on this subject several years ago, but there has been no criticism of any consequence during the present administration.

When Governor West of Oregon was elected to office the treatment of prisoners in the penitentiary of that state was said to be inhuman. The new governor, who in his earlier life had been a butcher's boy, a sheep herder, and a prospector in the Klondike, had developed a powerful faith in the desire of humanity to do right if given a fair chance. He entered office quoting Emerson, Voltaire, and Montaigne. He was agreed with Emerson that distrust is costly, and that "we make by distrust the thief, the burglar, the incendiary, and, by the court and the jail we keep him so." The "honor system" evolved from this view. It merely meant that a convict gave his word of honor that if released on parole he would not attempt to escape but would live an honest and straight life.[2]

Governor West in his desire to humanize the treatment of the criminal became too lenient. The feeling that he had abused the pardoning power became widespread. This feeling found expression in the inaugural message of Governor Withycombe to the legislature in 1915 when he said:

> The feature of the prison policy of the past which probably has most concerned the general public has been the tendency toward exaggerated leniency. I desire at this time to state emphatically that it will be the policy of the governor henceforth to entertain all due respect for judicial decisions, and where judge and jury have passed upon a case and sentence has been pronounced, only under the most exceptional circumstances will I feel warranted in setting aside or seriously modifying such sentence. The abolishment of the death penalty coupled with a growing disposition to regard lightly the binding nature of judicial sentences, instills me with the belief that a more sparing use of the pardoning power will have a salutary effect upon the criminal element, and is demanded in justice to the community at large.[3]

[1] Reproduced from *Fort Wayne Journal-Gazette.* [2] *Literary Digest*, XLIV, 1116.

[3] *Inaugural Message of James Withycombe to the Twenty-eighth Legislative Assembly, 1915*, pp. 10–11.

A former governor of Oklahoma garrulously expressed his fear of an abuse of the pardoning power in that state in a letter which was read at the Conference of Governors held at Colorado Springs, Colorado, in 1913, explaining his non-attendance. In this letter he said:

> The lieutenant governor seems determined to overthrow all of my policies and to make wholesale delivery of criminals from the penitentiary. The Criminal Court of Appeals in this state has joined hands with the lieutenant governor in this raid on the penal institutions by holding that the moment I leave the state, even if my absence extends only five minutes, the lieutenant governor can do as he pleases. Under these conditions, it would be a crime for me to leave Oklahoma.[1]

A feeling prevails in some circles in Utah that the clemency power is too freely exercised. The recent release upon parole, after a very brief confinement, of a former public official has tended to strengthen this view. A former attorney-general, who was secretary of the Board of Pardons, freely expressed disgust at the ease with which clemency was secured. Likewise the lenient policy of the former warden of the state prison was under fire since his influence with the Pardon Board was very marked.

A very diverse and marked opinion prevails in many states as to whether persons of political power and influence attempt to use such power and influence upon pardon officials in order to secure clemency for criminals. In such states as California, Connecticut, Indiana, Iowa, Maryland, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Utah, and Vermont pardon authorities assert that politics has no place in the administration of clemency, and that no attempt is made to exert political pressure upon the officials intrusted with this power. Pardon officials in a few states imply in their answers that they are not free to answer this question.

In Indiana it is said that it is generally understood that political pressure handicaps an applicant for clemency. Political pressure is probably attempted in Michigan, judged from the remarks of the secretary of the Board, who says, "So long as there is politics, there will be politicians who believe and lead others to believe they can use their influence with the powers that be." In Virginia it is believed that the governor is no more subject to such influence than is the judge who tried the case.

In Ohio the Board of Clemency points out that sometimes

> An occasional call or cheery letter from a prominent man is taken by the prisoner to mean political interference. Bad results flow freely and quickly.

[1] *Ex parte* Crump, 10 Okla. Cr. 133 (1913).

Men in trouble are quick to boast of a political "pull," if they think they have it, and such statements spread rapidly among the 2,000 prisoners. If these boasts were verified by quick release, incalculable harm would be done the men and the spirit of the institution. Where such boasts are made it is necessary for the Board to hold the man to disprove the claim of "pull."[1]

Authorities in Alabama say that political pressure is sometimes attempted and may have been effective in some cases in the past. It is also admitted that in rare instances it has been tried in Nebraska, South Dakota, and Wisconsin. Politics is many times brought to bear, but not successfully, it is said, in Illinois and Arkansas. And in Texas in certain cases, "almost every conceivable form of pressure, including political pressure, is brought to bear on the Governor in an effort to influence the action," says his secretary.

At times it may be difficult to determine whether an attempt is made to apply political pressure. Sometimes it may be attempted in such an insidious and elusive manner that pardon authorities may be unaware of any sinister motive in certain attempts to secure clemency. On the other hand wrong motives may at times be imputed to persons who are known to possess political power. As Governor Harrington of Maryland well said, "It is impossible to prevent persons of influence or persons holding political position, where they know the parties, not to speak to the Board or to the Governor in behalf of those they know." Such persons are not always using political influence but show only a personal interest in some unfortunate convict.

At any rate it would seem that public officials have not been active in using their official position for the purpose of exerting influence in this respect. In no state, in so far as can be determined, is there any statute or rule which prohibits public officials from applying for clemency or interesting themselves in behalf of a criminal. If there had been any serious abuse in this regard it is reasonable to suppose that legislation would have been enacted which would have prohibited its exercise.

A careful study of the whole problem leads one to feel that clemency has at times been granted too freely. This has been brought about through various causes. Lack of familiarity with the facts and circumstances of the case, caprice, undue compassion and mercy, social and political pressure, practice of deceit upon pardon officials, have all been contributing causes. Although one cannot entirely agree with the statement of a student of this problem that "there is no notable case of a

[1] *First Annual Report of Ohio Board of Clemency* (1918), pp. 13–14.

corrupt use of the power during years,"[1] yet one must conclude that pardon authorities, generally, have been honest and conscientious in their administration of this power. Their faults and mistakes have been due primarily to an insufficient knowledge of each case, and to a lack of any constant standard or basis of judgment in arriving at their decisions. It is not so much the character of the men but rather the method of procedure which is at fault. The remedying of this latter condition, it is believed, will lead to an improvement in our systems of administering clemency.

[1] W. W. Smithers, "The Use of the Pardoning Power," *Annals of the American Academy of Political and Social Science*, LII, 61.

CHAPTER V

THE PARDONING POWER IN SOME WESTERN STATES: CALIFORNIA, OREGON, NEVADA, IDAHO, UTAH, COLORADO, WYOMING

THE PARDONING POWER IN CALIFORNIA

In California the power to grant reprieves and pardons is vested by the constitution in the governor subject to such regulations as may be provided by law relative to the manner of applying for pardons.[1] By statute an Advisory Pardon Board was created in 1915 consisting of the lieutenant governor, who is chairman of the Board, the attorney-general, and the wardens of the state prisons at San Quentin and Folsom.[2] The State Board of Prison Directors acts as the Parole Board of the state.[3] This board consists of five citizens of the state. Clemency in California is administered by the governor and these two boards. The power to parole is exclusively in the hands of the State Board of Prison Directors. The power to pardon, commute sentences, and reprieve is exercised by the governor and the Advisory Pardon Board. This last-named Board maintains offices in San Francisco, and retains a permanent secretary. Since its creation the present attorney-general, wardens, and secretary have been connected with it. The only change in personnel has been the lieutenant governor. Therefore there has been a certain degree of permanency of policy maintained.

The Board does not act upon every petition made for clemency, but only upon such as the governor chooses to refer to it. The statute creating it provides:

> Upon request of the governor the board shall investigate and report upon all applications for reprieves, pardons, and commutations and make recommendations to the Governor. The board shall examine all applications, transcripts of judicial proceedings, affidavits, and has power to take testimony and to examine witnesses under oath.[4]

Before each meeting of the Pardon Board the secretary goes over each case that is to be considered, makes a brief of each case, and mails a copy to each member of the Board. Then when the Board meets he

[1] Constitution of California, Art. 5, sec. 13.

[2] Statutes of California, 1915, chap. 260, sec. 1.

[3] *Ibid.*, chap. 573.

[4] *Ibid.*, chap. 260, sec. 3.

presents more detailed evidence. When a case is referred to the Board the records in the governor's office are examined, together with any other papers that may be submitted. The record of the testimony is gone over, the prison files where the prisoner is incarcerated are examined, and the prisoner is interviewed. The case is thoroughly gone into and if the members of the Board deem it necessary, oral testimony is taken. After this investigation the matter is considered and a recommendation made to the governor. Since the Board is purely an advisory one, he is free to accept or reject its recommendations.

It is difficult to determine what proportions of applications for clemency are referred by the governor to the Board for investigation. The Board has no record or information concerning this. It makes no general report—it merely reports back to the governor its recommendations in each individual case that is referred to it. No records are kept of the applications for clemency that are refused by the governor. The only records available, therefore, are those in the governor's office containing a list of pardons, commutations, and reprieves granted by him, and the reasons therefor.

A personal examination of these records during the first four and one-half years of the existence of the Board of Pardons shows that most of the clemency granted was not recommended by the Board. A segregated list according to biennial periods is given on page 67.

These statistics indicate that during the first four and one-half years of its existence the Advisory Pardon Board recommended 19 per cent of the total number of pardons granted, 21 per cent of the total number of commutations granted, and made no recommendations regarding the granting of reprieves. It does not function in this latter respect at all because questions regarding the advisability of granting reprieves are not referred to it. An examination of the clemency records in the governor's office shows that in no case where clemency was granted was there an unfavorable recommendation from the Pardon Board.

As to the classes of cases which are referred to the Board by the governor, Board members believe that probably the more difficult cases, at least the more controversial ones, are so referred. Yet it appears that the famous Thomas J. Mooney case was handled by the governor himself without any reference to the Board of Pardons.

Since the governor avails himself of the services of the Board to a limited extent, the question that naturally arises is, Upon whose recommendation does he depend? An examination of the pardon records in his office shows that those cases on which favorable action is taken

BIENNIAL PERIOD 1915–1916 INCLUSIVE

Pardons granted by Governor Hiram Johnson	39
Pardons recommended by Pardon Board	5
Commutations granted by Governor Johnson	39
Commutations recommended by Pardon Board	10
Reprieves granted by Governor Johnson	9
Reprieves recommended by Pardon Board	2

(These two reprieves recommended, although listed as reprieves, were really commutations, since punishment was commuted from death to life-imprisonment.)

BIENNIAL PERIOD 1917–1918 INCLUSIVE

Pardons granted by Governors Johnson and Stephens		69
Divided as follows:	Under Governor Johnson	32
	Under Governor Stephens	37
Pardons recommended by Pardon Board		14
Divided as follows:	Under Governor Johnson	7
	Under Governor Stephens	7
Commutations granted by Governors Johnson and Stephens		38
Divided as follows:	Under Governor Johnson	9
	Under Governor Stephens	29
Commutations recommended by Pardon Board		7
Divided as follows:	Under Governor Johnson	1
	Under Governor Stephens	6
Reprieves granted by Governors Johnson and Stephens		5
Divided as follows:	Under Governor Johnson	0
	Under Governor Stephens	5
Reprieves recommended by Pardon Board		0

PERIOD FROM JANUARY 1, 1919, TO JULY 11, 1919

Pardons granted by Governor Stephens	15
Pardons recommended by Pardon Board	5
Commutations granted by Governor Stephens	12
Commutations recommended by Pardon Board	2
Reprieves granted by Governor Stephens	3
Reprieves recommended by Pardon Board	0

usually have the recommendation of persons of influence. An examination of hundreds of cases covering a period of eight and one-half years shows that recommendations for favorable action come chiefly from the wardens of the state prisons, trial judges, prosecuting attorneys, members of the State Supreme Court,[1] the State Board of Prison Directors, individual members of this Board, the State Parole Officer, chiefs of police, sheriffs, prison physicians, members of the state legislature, members of city councils, leading private citizens, and the Advisory Board of Pardons. Often applications for clemency are indorsed by several of these combined agencies.

One feels after a study of the situation in California that some improvement might be made in the granting of clemency if the governor were inclined to use the Pardon Board to a greater extent than he now does. It is better prepared to study these prob'ems than he is personally. In a state the size of California too much of his time is needed in other fields of activity. Yet this criticism is not meant as a reflection upon the administration of clemency in that state. One feels that there is no abuse in this respect. Considering the large prison population one is surprised at the small number of pardons and commutations granted when compared with the number granted in some of the other states. One must conclude that the pardoning authority in California pursues a sensible, conservative, and yet progressive policy. Crime and life are not held lightly, and yet incarceration is used to help reform a prisoner and to assist him better to re-enter society when he again emerges into freedom.

THE PARDONING POWER IN OREGON

In Oregon the governor, by virtue of constitutional power, is authorized to grant reprieves, commutations, and pardons after conviction, subject to such regulations as may be prescribed by law. He is to report to each legislative assembly each case of clemency granted with the reasons for so doing.[2] By legislative enactment, as amended in 1915, a Parole Board has been established, consisting of the superintendent of the state prison, the governor's secretary, the state parole officer, and two other members appointed by the governor.[3] The

[1] "Neither the Governor nor the Legislature shall have power to grant pardons or commutations of sentence, in any case where the convict has been twice convicted of a felony, unless upon the written recommendation of a majority of the Judges of the Supreme Court."—Constitution of California, Art. 7, sec. 1.

[2] Constitution of Oregon, Art. 5, sec. 14.

[3] General Laws of Oregon, 1915, chap. 176, sec. 1.

Parole Board acts as an Advisory Pardon Board to the governor and deals with such cases only as he refers to it. In this respect it is similar to the Advisory Pardon Board in California.

In Oregon it is common to use three forms of clemency: (*a*) parole, (*b*) pardon, (*c*) restoration to citizenship. A person on parole is under the direction and control of the state parole officer until the expiration of the maximum term of sentence. Such person is not in possession of full legal rights and privileges, and must abstain absolutely from the use of intoxicating liquors, must avoid evil associations, must not frequent improper places of amusement, and must respect and obey the laws and in all ways conduct himself as a good citizen. The governor may at any time revoke a parole, with or without notice, and cause the paroled person to be returned to the penitentiary.

The so-called pardon issued in Oregon is in reality a conditional pardon. It is issued by the governor and restores to the person receiving it all the rights and privileges heretofore enjoyed by him under the laws of the state. It is issued upon the agreement that the recipient is to be and remain a law-abiding citizen, and in case he violates any of the laws of the United States, or of Oregon, or of any municipality in which he lives, or any of the foregoing conditions, the governor, whenever he is satisfied by such investigation as he may see fit to make that the agreement has been violated, may revoke the pardon without notice and without the intervention of any court, and may direct any peace officer to arrest the recipient of the pardon and return him to prison.

The "restoration to citizenship" is usually granted by the governor to a person who has satisfactorily met his conditions of parole, and grants unto him a full pardon, restoring to him all the rights and privileges heretofore enjoyed by him under the laws of the state.

Since the Parole Board in Oregon is an Advisory Pardon Board to which the governor may refer for advice such clemency cases as he desires, a situation exists similar to that which prevails in California. The question therefore naturally arises again as to the extent to which the governor relies upon this Board for advice and assistance. To determine an answer to this question a personal study was made of volumes V, VI, and VII of *Pardons, Remissions, and Commutations of the State of Oregon* for the period from February 2, 1911, to July 15, 1919. This involved a study of 1,257 cases while Governors West, Withycombe, and Olcott were the governors of Oregon. The results of this study may be summarized as follows.

Governor West granted clemency in 532 cases from February 2, 1911, to January 11, 1915. Of these cases the Board of Parole recommended that clemency be granted as follows: Pardons 96, commutations 2, restoration to citizenship 0; total 98.

Governor Withycombe granted clemency in 620 cases from February 11, 1915, to February 10, 1919. Of this number the Board of Parole recommended clemency as follows: pardons 118, commutations 0, restoration to citizenship 195; total 313.

Governor Olcott granted clemency in 105 cases from March 15, 1919, to July 15, 1919. Of this number the Board of Parole recommended clemency as follows: pardons 9, commutations 0, restoration to citizenship 73; total 82.

In a total of 1,257 cases of clemency granted during this entire period the Board of Parole recommended clemency in 493 cases.

During Governor West's administration the Parole Board recommended clemency in 18 per cent of the cases in which it was granted. During Governor Withycombe's term of office the Parole Board recommended clemency in 50 per cent of the cases in which it was granted. During the first half-year of Governor Olcott's term the Parole Board recommended clemency in 78 per cent of the cases in which it was granted. These statistics are significant. They show that under Governor West's administration the Parole Board did not pass upon the question of restoration of citizenship, whereas the Board made many recommendations to this effect during the administrations of Governors Withycombe and Olcott. These statistics also show a much greater inclination on the part of the last two governors, especially Governor Olcott, to avail themselves of the service of the Parole Board than did Governor West.

In addition to the recommendations of the Parole Board the records disclose that recommendations for clemency come to the governor from trial judges, district attorneys, prison physicians, members of juries, witnesses in cases, employers, chiefs of police, and even the Norwegian consul, and the state game warden.

The impression one gathers from a study of the records is that clemency has been freely extended in Oregon, sometimes for light and even trifling reasons. Under Governor West's administration the state of Oregon became rather notorious for the leniency shown to criminals. Governor Withycombe, who followed, intended to be strict as shown in his first message to the legislature, but he soon drifted into the same policy pursued by his predecessor. Governor Olcott also began his

administration by showing much leniency during his first four months in office. Considering its prison population Oregon seems to be much more lenient than California in the granting of clemency.

THE PARDONING POWER IN NEVADA

The constitution of Nevada vests the clemency power in a Board of Pardons and Parole Commissioners consisting of the governor, the members of the state Supreme Court (three in number), and the attorney-general. The Board, or a major part of them, of whom the governor must be one, may grant clemency subject to such regulations as the legislature may provide relative to the manner of applying for pardons. The governor is required to communicate to the legislature at each session each case of clemency granted, but he is not required and does not give the reasons for having granted clemency. The Board sits in two separate capacities—in one as a Pardon Board and in the other as a Board of Parole Commissioners.

The secretary of the Board is also the governor's private secretary. In view of the fact that much of his time is given to other activities, the records of the Board are in good shape. The official pardon records consist of (*a*) Memoranda of Applicants for Clemency, (*b*) Register of Prisoners Received in the Nevada State Prison since December 20, 1866, (*c*) Minutes of State Board of Pardons and Parole Commissioners, (*d*) Filing Jacket containing materials relating to clemency.

The Memoranda of Applicants for Clemency contains information in the nature of data relating to each prisoner who has applied for clemency. In addition to this data there appear remarks (always very brief) such as the name of the petitioner's attorney, whether application was granted or denied, conditions, if any, under which an application was granted, the affirmative or negative vote of each individual member of the Board.

The Register of Prisoners Received in the Nevada State Prison is devoted chiefly to data descriptive of the prisoner. The total number of such prisoners in Nevada from December 20, 1866, to June 20, 1919, was 2,152.

The Minutes of the State Board of Pardons describe the business transacted by the Board. No stenographic reports of the hearings are kept. The minutes merely show the date of the meeting, whether it was a morning or afternoon session, which members of the Board were present, the cases heard, who appeared in behalf of the prisoner. (The arguments of such persons either are not given or else in very incomplete

form.) The Board then usually goes into executive session. The discussion while in executive session is not given. The names of the members moving that clemency be granted or be not granted and of the members seconding such motions are given. The vote of each member of the Board is recorded. The Board then returns into open session where announcement is made of the action taken in executive session. The conditions under which pardons or paroles are granted are stated in the minutes. The minutes contain the name of the applicant for clemency but do not state the crime. The minutes on file in the office of the Secretary of the Board of Pardons date back only to January 4, 1911. The secretary has been unable to find those earlier than this date.

The "Filing Jacket" contains such information and material as: (*a*) Applications for clemency filed on printed forms. (*b*)Permissions granted by the Board of Pardons to petitioner to make application. (*c*) Notice of intention to apply for clemency. (*d*) Acknowledgement of notice received by the district attorney and district judge that they had been notified of the intention of the applicant to ask for a hearing. (The Pardon Board now notifies the district judge and the district attorney. Formerly the applicant did this.) (*e*) Summary of the trial submitted by the district attorney as required by law. (Sometimes it is difficult to get the district attorney to do this.) (*f*) Recommendations of other persons, promises to furnish employment for the prisoner if released, etc.

The Rules of the Board of Pardons provide that when the Board votes upon any application for clemency the roll of members shall be called by the clerk in the following order: first, the attorney-general; second, the junior associate justice of the Supreme Court; third, the senior associate justice of the Supreme Court; fourth, the chief justice of the Supreme Court; fifth, the governor.[1]

This rule does not seem to work well. The way in which each member votes on each case becomes public with the result that he is subjected to public criticism. Therefore, it is said on incontrovertible evidence, the members of the Board sometimes vote so as to curry popular favor rather than to be consistent. In one county in the state to release a horse thief or cattle thief would provoke more antagonism than would the release of a murderer. Therefore it is asserted that members are careful in their voting, especially preceding an election in which they are candidates for re-election. Popular approval of their action on clemency matters is a political asset. The present method is

[1] Rules of Nevada Board of Pardons. Rule 8.

condemned by the governor, who feels that secrecy in voting would encourage freedom of action to a greater degree than is possible under the present system. For the same reason he favors an appointive Board instead of one composed of elective officials. Such a Board, he feels, would be less inclined to cater to popular feeling.

It is said that the Supreme Court judges and the attorney-general when first elected are averse to showing leniency but that in the course of time they become more mellow. These officials have often been trial judges or prosecuting attorneys previously and approach a question of granting clemency from their earlier point of view. On the other hand the governor believes that prisoners are often impelled to plead guilty through persuasion, threats, coercion, or "third degree" methods, and then when they apply for parole or pardon their former plea of guilty is used against them. Therefore the governor is inclined to favor leniency because he says that a prisoner should be released before he loses his self-respect, otherwise his reformation is impossible and he will come out of prison at the end of his term a hardened criminal.

Considering that most of the convicts in the Nevada penitentiary are not citizens of the state but transients, chiefly Mexicans, Greeks, and a few Japanese and Chinese, an impartial investigator is inclined to the view that leniency is too freely granted in Nevada. Since both the state population and the prison population are small the cases of clemency granted are rather large in comparison with some other states.

During the years 1913–14 clemency was granted as follows: pardons 12, paroles 112, commutations 2, restoration to citizenship 3, remission of fines 1.[1] In 1915 and 1916 there were granted: pardons 12, paroles 179, commutations 2, restoration to citizenship 10, remission of fines 2, paroles to Nevada School of Industry 4.[2] During the years 1917–18 clemency was granted as follows: pardons 33, paroles 181, commutations 11, restoration to citizenship 11, paroles to Nevada School of Industry 5.[3]

This apparent looseness is due in part to insufficient time being given to the matter of clemency. The Pardon Board meets but semi-annually. This means that only eight regular meetings are held during an entire term of the governor and attorney-general. It is said that there is a tendency to hurry through the consideration of applications unless the governor is present who insists on more thoroughness in going into the merits of the cases than do the other members of the Board.

[1] *Message of Governor Boyle to Legislature of 1915*, pp. 33–35.

[2] *Message of Governor Boyle to Legislature of 1917*, pp. 42–46.

[3] *Message of Governor Boyle to Legislature of 1919*, pp. 37–41.

THE PARDONING POWER IN IDAHO

A Board of Pardons is established in Idaho by constitutional provision, consisting of the governor, secretary of state, and the attorney-general. This Board, or a majority thereof, is empowered to grant clemency. It is not an advisory board such as those in California, Oregon, Colorado, or Wyoming, but possesses full and final power in clemency matters. The governor is merely a member, and a majority (regardless of whether the governor helps to constitute that majority) determines the action of the Board. The Board may grant pardons, reprieves, commutations, and paroles. But an Act of 1909[1] as amended in 1911[2] constitutes the governor, secretary of state, and the attorney-general a State Board of Prison Commissioners which may establish rules under which prisoners may be allowed to go on parole under certain conditions. In Idaho there are therefore two clemency boards composed of the same membership. Both boards meet quarterly, and within one month of each other.

The prison population is small, approximately two hundred or slightly more, and the administration of clemency is carried on with some degree of laxness. The records are in poor shape, which makes it difficult to learn much regarding past practices. All records are contained in one volume entitled "Record Board of Pardons (A) Idaho." They are written in long hand from April 1, 1891 (the first session of the Board), to December 24, 1910. Since then they are in typewritten form. They contain the minutes of the Board as well as the list of pardons and other forms of clemency which have been granted. In many instances the crime for which clemency has been granted is not stated. The minutes of the Board of Pardons, and of the Board of Parole since its creation, are recorded indiscriminately in the same volume, the same page sometimes being given over to the minutes of the two Boards. The records since 1911 are less complete in showing the reasons for the action which was taken in each case. In a few instances the reasons are given in great detail, but in the great majority of cases the reasons for the action are very briefly stated or not at all. The constitution requires that the reasons for granting clemency shall be reduced to writing and filed in the office of the secretary of state, who is also secretary of the Board. It is evident that this provision of the constitution is not fully complied with. In fact the secretary of the Board was not fully informed of this requirement until his attention was called to it.

[1] Idaho Session Laws (1909), p. 82, sec. 2.

[2] *Ibid.* (1911), p. 216, sec. 1.

Beginning with 1915 an attempt has been made in the "Record" to classify the action of the Board under such headings as: pardons granted, paroles granted, applications denied, etc., but this classification is not followed consistently.

Before an application comes before either the Pardon Board or the Parole Board each member is furnished with a summary or brief of the vital facts of the case. One day the Pardon Board listens to testimony submitted in behalf of or against applicants, then the next day it visits the state prison and interviews the applicants. A practice has developed of releasing some deserving prisoners at Christmas time.

Some interesting things are encountered in working through the "Record." In one case in 1891, involving life-imprisonment for murder and in which the applicant petitioned for a pardon, three days were spent by the Board in reading the transcript of the trial and two days in listening to counsel for and against petitioner. In another case heard in 1891, where the applicant was sentenced for assault with intent to commit murder, a petition for pardon was presented signed by hundreds of citizens, all the county officers, the members of the trial and grand juries, and the members of the legislature from the county in which the prisoner lived. One petition for clemency was rejected in 1891 although it was recommended by James H. Hawley (later governor of Idaho) and Senator Shoup. Another petition for pardon recommended by over two hundred citizens, thirty-five members of the General Assembly, the district attorney, the trial judge, and Senator Shoup was granted on condition the prisoner leave the state and never return. On July 1, 1908, the death sentence of Harry Orchard (the murderer of Governor Steunenberg) was commuted to life-imprisonment by a vote of the Board by a majority of two members to one. Such cases as these arouse interest but ordinarily the public has no interest in the actions of the Pardon Board. There seems to be no abuse in the exercise of clemency in Idaho, but the manner of keeping records should be systematized, and more care and accuracy given to the subject.

THE PARDONING POWER IN UTAH

The constitution of Utah creates a Board of Pardons consisting of the governor, the justices of the Supreme Court, and the attorney-general. A majority of this Board, including the governor, may grant clemency subject to such regulations as may be provided by law relative to the manner of applying for pardons. The proceedings and decisions of the Board, with the reasons therefor in each case, are to be reduced to

writing and filed in the office of the secretary of state. The governor is required by the constitution to communicate to the legislature at each regular session a record of each case of clemency granted since the last previous report, with the reasons for granting the same.

The constitutional provision that a majority of the Board, including the governor, may grant clemency has come in for a little criticism. It is felt by some that there is no valid or logical reason why clemency should be refused, if a majority of the Board is favorable to granting it, merely because the governor is opposed to granting the same. The oldest member in point of service on the Pardon Board says that some members of the Board who are justices of the Supreme Court recognize the validity of this objection, although these same justices when members of the State Constitutional Convention in 1895 approved of the present arrangement.

The provision of the constitution that the governor shall communicate to the legislature at each regular session each case of clemency granted since the last previous report with the reasons for granting the same is a dead letter. Governors do not comply with this constitutional requirement. This statement is substantiated by a former governor, secretary of state, attorney-general, and justices of the Supreme Court. When the attorney-general was asked point blank if the governor could determine for himself whether he obeyed the constitution or not, he replied that there was no effective way of compelling the governor to comply with this constitutional requirement.

The records of the Pardon Board are divided—some being filed in the office of the secretary of state and some in the office of the attorney-general. This comes about from the fact that the attorney-general is the secretary of the Board, but the constitution provides that the proceedings and decisions of the Board, with the reasons therefor in each case, are to be reduced to writing and filed in the office of the secretary of state. This results in some confusion and unnecessary complication and should be remedied. There is no good reason why all the records should not be kept in one office.

The records in the office of the attorney-general consist of a "Register of Board of Pardons," also called "Record of Board of Pardons, State of Utah, No. I." This volume contains entries from 1896 to 1918, but the entries for the later years are not complete. The earlier entries are in longhand. The information contained herein gives the sentence of each convict, the names of the trial judge and prosecuting attorney, the application of each convict asking clemency, and the action taken

by the Board of Pardons on such applications. The reasons for the action of the Board are not given. Some decisions are reached in open session, and some in executive session. From 1896 to about 1905 the vote of the individual members of the Board is given in each case, but this is not done since the last-named date. In more recent years all of this material is kept on a card file which is indexed. But some of the information on the card file is also contained in this volume. Consequently there is duplication to some extent. But the whole of the material in the volume has not been transferred to the card index and there is no way of determining which information has been transferred and which has not.

A second volume in the attorney-general's office contains brief minutes of the meetings of the Board of Pardons, beginning with the meeting of June 20, 1914, and coming up to date. Sometimes a very brief statement of the reasons for the action of the Board in each case is given, but this plan is not consistently followed. The reasons given in this volume are identical for each case with the reasons found in the regular minutes of the Board which are on file in the office of the secretary of state. Very brief reasons are given for the granting of pardons and commutations. No reasons are given for the granting of paroles and termination of sentence.

The records in the office of the secretary of state consist of "State of Utah. Pardons. Volume A." This volume contains a record of pardons granted since February 15, 1896. This record is in the form of a duplicate of each pardon issued, with the signature of the governor and the secretary of state attached. The reasons for granting pardons are not given but a statement occurs that the reasons for doing so have been filed in the office of the secretary of state. The reasons for favorable action by the Board of Pardons are contained in the Minutes of the Board and are on file in this office. These minutes are not in book form but are filed away on loose sheets of paper in typewritten form. The minutes of each meeting cover from one to six pages, depending on the amount of business transacted by the Board at each session.

The reasons of the Board in each case are usually contained in one short paragraph. In some cases each reason given is contained in one sentence. In exceptional or notorious cases the reason is set forth at greater length. When opposition to granting clemency develops it is usually from members of the Supreme Court or the attorney-general—not from the governor.

A detailed analysis of the action of the Pardon Board in granting clemency since statehood shows the following:

1896	
Pardons and commutations granted	26
Pardons and commutations denied	32
1897	
Pardons and commutations granted	17
Pardons and commutations denied	23
1898	
Pardons and commutations granted	18
Pardons and commutations denied	39
1899	
Pardons and commutations granted	19
Pardons and commutations denied	31
1900	
Pardons, commutations, and paroles granted	33
Pardons, commutations, and paroles denied	38
1901	
Pardons, commutations, and paroles granted	13
Pardons, commutations, and paroles denied	31
1902	
Pardons, commutations, and paroles granted	37
Pardons, commutations, and paroles denied	33
1903	
Pardons, commutations, and paroles granted	29
Pardons, commutations, and paroles denied	48
1904	
Pardons, commutations, and paroles granted	33
Pardons, commutations, and paroles denied	42
1905	
Pardons, commutations, and paroles granted	30
Pardons, commutations, and paroles denied	36
1906	
Pardons, commutations, and paroles granted	22
Pardons, commutations, and paroles denied	61
1907	
Pardons, commutations, and paroles granted	35
Pardons, commutations, and paroles denied	73
1908	
Pardons, commutations, and paroles granted	38
Pardons, commutations, and paroles denied	73
1909	
Pardons, commutations, and paroles granted	61
Pardons, commutations, and paroles denied	83

ACTION OF BOARD OF PARDONS, 1910

Pardons: granted 12; denied 58.
Commutations: granted 6; denied 18.
Paroles: granted 4; denied 4.
Ordered released 15.

ACTION OF BOARD OF PARDONS, 1911

Pardons: granted 33; denied 37.
Commutations: granted 3; denied 10.
Paroles: granted 5; denied 9.
Restoration of credits: granted 1; denied 1.

ACTION OF BOARD OF PARDONS, 1912

Pardons: granted 29; denied 45.
Commutations: granted 7; denied 23.
Paroles: granted 9; denied 6.
Ordered released: none.
Restoration of credits: granted 0; denied 1.
Fines remitted: granted 2; denied 0.

ACTION OF BOARD OF PARDONS, 1913

Pardons: granted 26; denied 46.
Commutations: granted 4; denied 17.
Paroles: granted 16; denied 21.

ACTION OF BOARD OF PARDONS, 1914

Pardons: granted 30; denied 105.
Commutations: granted 45; denied 27.
Paroles: granted 30; denied 27.
Ordered released 1.
Restoration of credits: denied 1.

(Accuracy of statistics for this year cannot be absolutely determined because of irregularity in records.)

ACTION OF BOARD OF PARDONS, 1915

Pardons: granted 27; denied 106.
Commutations: granted 24; denied 58.
Paroles: granted 33; denied 33.
Termination of sentence: granted 64; denied 72.
Restoration of credits: granted 4; denied 1.

ACTION OF BOARD OF PARDONS, 1916

Pardons: granted 4; denied 151.
Commutations: granted 32; denied 46.
Paroles: granted 33; denied 28.
Credits: restored: granted 1; denied 1. Reprieves granted 5.
Termination of sentence: granted 129; denied 91.

ACTION OF BOARD OF PARDONS, 1917

Pardons: granted 18; denied 90.
Commutations: granted 46; denied 39.
Paroles: granted 44; denied 37.
Restoration of credits: granted 2; denied 0.
Sentence terminated: granted 145; denied 110.
(Many applications for rehearing are denied.)

ACTION OF BOARD OF PARDONS, 1918

Pardons: granted 11; denied 58.
Commutations: granted 13; denied 20.
Paroles: granted 44; denied 62.
Termination of sentence: granted 97; denied 61.
Restoration of credits: granted 1; denied 0.
(Many applications for rehearing are denied. The Board refuses many applications for pardons but often grants a commutation of sentence to end immediately, or a termination of sentence to end at once in the place of the pardon requested.)

ACTION OF BOARD OF PARDONS, JANUARY 1, 1919, TO MAY 17, 1919

Pardons: granted 4; denied 8.
Commutations: granted 6; denied 6.
Paroles: granted 13; denied 16.
Termination of sentence: granted 34; denied 26.

During the last four years the Pardon Board has been "under fire" for its lenient policy. This policy reflected particularly the views of the warden of the state prison who, it was generally admitted, had considerable influence with the Board of Pardons. This criticism was reflected in the fact that the population of the state prison during the first part of January, 1917, was 288 convicts, whereas on August 16, 1919, it was 99 convicts. Because of this criticism the warden felt impelled to submit a report on November 10, 1917, to the Pardon Board for its own information, and "with a view of offsetting the contention in certain quarters that society has been greatly menaced on account of the release of prisoners by the State Board of Pardons." The report covers the period from April 1, 1917, to November 1, 1917, and shows that clemency was extended as follows: pardons 9, commutations 11, paroles 25, termination of sentence 48; total 93. The warden states that he has positive knowledge of all but 17 out of these 93 men who have been released. Of that number only 7 were known to have gone wrong, leaving a percentage of 91 per cent who were making good.

A new state administration has come into power and a new warden of the state prison has recently been appointed, but it is too early to determine what effect, if any, this change will have on the policy of the State Board of Pardons.

THE PARDONING POWER IN COLORADO

The constitution of Colorado provides that the governor shall have the power to grant reprieves, commutations, and pardons subject to such regulations as may be prescribed by law relative to the manner of applying for pardons. By statute a State Board of Pardons and a State Board of Charities and Corrections were established. These two Boards seem to have been operated jointly, since all supplies for the former Board were furnished by the latter. The State Board of Charities and Corrections also furnished the clerical help needed to look after clemency matters. This arrangement did not work well. Friction between the two Boards developed to the extent that the *Biennial Report of the Board of Pardons* was not published during the period 1912–16, although such publication is ordered by statute. Finally in 1919 the legislature segregated the two Boards, since which their relations have been separate and distinct.[1]

The Board of Pardons consists of four members to be appointed by the governor for a term of four years. He is ex officio a member and also the president of the Board. It is the duty of the secretary, in conjunction with the Board, to investigate all applications for executive clemency and to transmit all information with its recommendations to the governor. This makes the Board purely an advisory one. This Board differs from the California and Oregon Advisory Boards in that its duty is to investigate all applications for clemency, and not merely those referred to it by the governor as is true of the California and Oregon Boards.[2] As a matter of fact the Board seems limited to a consideration of applications for pardon, reprieve, and commutation. Questions of parole are not passed upon by the Board, since the governor retains this matter in his own hands entirely. This is so because a prisoner who has served the minimum term is eligible for parole under the indeterminate sentence law which works automatically without action by the Board of Pardons.

Colorado governors seem to have relied to a considerable degree upon the advice and recommendations of the Board. Governor Buchtel in his biennial message of January 11, 1909, to the legislature states he had pardoned a total of thirty applicants during the preceding two years.

[1] Session Laws of Colorado, 1919, chap. 58, sec. 1. [2] *Ibid.*, sec. 4.

He infers that his action was based on the recommendations of the Board of Pardons.

Governor Shafroth from January 12, 1909, to January 10, 1911, granted one pardon, twenty-nine commutations from the penitentiary, eighteen commutations from county jails, one commutation from the reformatory, and one reprieve. Of these the Board of Pardons recommended the one pardon, seventeen commutations from the penitentiary, and twelve commutations from county jails.[1] From January 11, 1911, to January 14, 1913, Governor Shafroth granted three pardons, thirty-four commutations, and one reprieve. Nearly all of these were recommended by the Board.[2]

Governor Elias M. Ammons during his term of office from January, 1913, to January, 1915, granted one reprieve, one pardon, and fifty-seven commutations. The Pardon Board did not make a favorable recommendation in the one pardon case and in the one reprieve case, but it made favorable recommendations in the entire fifty-seven commutation cases.[3]

From March 31, 1915, to January 8, 1917, Governor George A. Carlson granted eight pardons, thirty-seven commutations, and one reprieve. Four of the pardons and twenty-three of the commutations were recommended favorably by the Pardon Board. Of the remaining fourteen commutation cases the sentence was commuted in thirteen of the cases so as to allow the return of the prisoners to other state prisons as parole violators, or as escaped prisoners.[4] Giving consideration to this last fact it is seen that Governor Carlson followed the advice of the Board very closely.

Governor Gunter reported to the Twenty-second General Assembly, January 8, 1919, that from May 17, 1917, to January 2, 1919, he had granted ten pardons, thirty-four commutations, and one reprieve. Of these the Pardon Board recommended favorably five pardon cases and the entire thirty-four commutation cases.[5]

From this summary covering a period of about ten years it appears that the Pardon Board is of considerable assistance to the governor, and that he has generally followed its recommendations. This is

[1] *House Journal of Eighteenth General Assembly, April 25, 1911*, pp. 25–59.

[2] *Tenth Biennial Report of State Board of Pardons of Colorado, 1910–12*, pp. 10–13; and *Senate Journal of Nineteenth Legislative Session*, p. 93.

[3] *Senate Journal of Twentieth Legislative Session, 1915*, pp. 79–96.

[4] *House Journal of Twenty-first General Legislative Assembly, 1917*, pp. 2–9.

[5] *Senate Journal of Twenty-second General Assembly, 1919*, pp. 28–36.

perhaps partly due to the fact that the governor is president of the Board and helps in reaching the conclusions which are arrived at by that body. Previous governors had always taken an active part in the discussions and voting of the Board. But when Governor Shoup became head of the Board in 1919 he followed the policy of acting merely as a presiding officer and refrained from voting and indicating his views while meeting with the Board.

The proceedings of the Board are transmitted in a biennial report of the secretary to the governor, and the action of the governor on clemency matters is reported by him to the legislature at each regular session. The records and files of the Pardon Board are kept in a most excellent manner, due to the fact that the secretary's time is given wholly to the work in this office. Long service by this official also contributes to the general efficiency that exists with respect to the records.

One feels that clemency matters are well handled in Colorado and that a conscientious and successful effort is made to protect the public welfare and yet be of assistance to the criminal.

THE PARDONING POWER IN WYOMING

The constitution of Wyoming provides that the governor shall have power to grant clemency after conviction but the legislature may by law regulate the manner in which clemency may be applied for. He shall communicate to the legislature at each regular session each case of clemency granted with his reasons for granting the same.[1]

The legislature has created a Board of Pardons to consist of the State Board of Charities and Reform, with the governor as president of the Board.[2] This Board consists of the governor, secretary of state, state treasurer, state auditor, and the state superintendent of public instruction.[3] It is provided that the Pardon Board "shall investigate all applications for executive clemency and lay the facts before the governor with its recommendations."[4] It is seen that the Pardon Board in Wyoming is similar to the Colorado Board in the fact that the governor is president of each Board, that each Board investigates all applications for executive clemency, and that the Boards are purely advisory. They differ in the fact that the Colorado Board, aside from the governor, is composed entirely of private citizens, whereas the Wyoming Board consists wholly of state officials.

The pardon records of the Board are kept in the office of the State Board of Charities and Reform. They show the recommendations

[1] Constitution of Wyoming, Art. 4, sec. 5.

[2] Wyoming Compiled Statutes, 1910, sec. 551.

[3] *Ibid.*, sec. 436.

[4] *Ibid.*, sec. 552.

made by the Board in respect to clemency, but do not show the reasons for making the recommendations.

It is of interest to note the degree to which the governor has acted on the recommendations of the Board. To do this it is necessary to examine his report to the legislature at each regular session, which is required by the constitution, and in which he gives his reasons in each case for the action he has taken. The reports of the governors in this matter are not included in the printed biennial messages to the legislature, but are found in the Senate or House journals.

For some unexplained reason such a report for the biennial period from 1909 to 1911 is not to be found in either the House or the Senate journal of the Eleventh Legislature (1911). During the biennial from January 2, 1911, to January 1, 1913, Governor Joseph M. Carey granted forty pardons and sixty commutations to prisoners confined in the state prison. These grants were all made on the recommendation of the State Board of Pardons.[1] In addition the governor granted pardons to sixteen juvenile delinquents, and to three prisoners in county jails. The report to the legislature shows the name of the convict, crime, sentence, date of sentence, date of granting clemency, and reasons for granting the same.

From January 1, 1913, to January 4, 1915, Governor Joseph M. Carey granted twenty-three pardons and thirty-six commutations to persons sentenced to the state prison.[2] All of these were recommended by the State Board of Pardons. In thirteen cases where pardons were granted the applicants had already been paroled. Four other pardons were granted as "Christmas pardons." In addition to the above, nine pardons were granted to juvenile delinquents. The report to the legislature is similar to that for the previous biennial and shows the reasons for granting clemency in each case.

The report of Governor John B. Kendrick for the period from January, 1915, to January, 1917, shows that he granted seventeen pardons and no other form of clemency. It also gives the name of the convict in each case, the name of the crime in fourteen cases but not in three cases, the date of sentence in eleven cases but not in six cases, the date when pardon was granted in all cases, and the reasons for granting pardons in seven cases but not in ten cases.[3] The reasons given do not

[1] *Senate Journal of Twelfth Wyoming Legislature, 1913*, pp. 92–101.

[2] *Senate Journal of Thirteenth Wyoming Legislature, 1915*, pp. 26–32.

[3] *Senate Journal of Wyoming Legislature, Session of 1917*, p. 57.

indicate whether or not the Pardon Board made any recommendations which were acted upon.

Clearly the data in this report does not conform to the constitutional requirements. The secretary of the Pardon Board questions the accuracy of this report. An examination of the Biennial Report of the State Board of Pardons for the two years ending September 30, 1916,[1] shows that during this period the Board recommended the granting of twenty-six pardons and forty commutations. The period covered by the report of the Board does not coincide with the period of the governor's report and therefore is of value only in pointing out that during the period of Governor Kendrick's administration the chief executive followed the advice of the Pardon Board with much less consistency than did his predecessor in office. There is reason, however, as has already been pointed out, to question the accuracy of this report to the legislature, and the secretary of the Pardon Board goes so far as to say that the data is erroneous.

The next report to the legislature regarding clemency granted is made by Governor Robert D. Carey and covers the period from September 30, 1916, to September 30, 1918.[2] It is evident that this report overlaps that of Governor Kendrick's, extending as it does from January, 1915, to January, 1917. Consequently from September 30, 1916, to January, 1917, there may be duplication in respect to the clemency extended, but this cannot be definitely determined from the reports.

Governor Robert D. Carey's report shows that during the period covered he granted forty-six pardons. The application or request for these pardons was made by the State Board of Pardons in eight cases, by the warden of the state prison in nine cases, and by private individuals in twenty-nine cases. The governor also granted thirty-nine commutations. The application for these commutations was made by the State Board of Pardons in seven cases, by the warden in seventeen cases, and by private individuals in fifteen cases. The report of the governor contains the name of the convict, his prison number, date of sentence, county in which convicted, the crime, the sentence, the form of clemency granted, by whom application for clemency was made, and the date of granting clemency. The reasons for granting clemency are not given in the report, although this information is required to be given by a provision of the state constitution.

[1] *Biennial Report of Wyoming State Board of Charities and Reform, 1915–16*, pp. 117–19.

[2] *Senate Journal of Wyoming Legislature, Session of 1919*, pp. 294–96.

During a part of the biennial from September 30, 1916, to September 30, 1918, Secretary of State Frank L. Houx was acting governor of the state. In so far as he granted clemency such is included in the report of Governor Robert D. Carey. Acting Governor Houx created considerable discussion when he granted a few pardons without consulting the Pardon Board and withheld his action from the press. In contrast to this policy Governor Carey always consulted the Board, and even refused to grant an urgent pardon without first calling the Board into special session.

It appears that in Wyoming the governor has not always relied upon the recommendations of the Pardon Board in granting clemency. Some governors have followed its advice scrupulously and others have relied to a greater degree upon their own judgment. The records are not always in the best possible condition and this gives rise to some confusion in making a comparative study.

The method of reporting the action of pardon authorities varies considerably. In some states much information is set forth with a reasonable degree of fulness, whereas in other states it is reported with the utmost brevity. A portion of the reports of the Pardon Boards of Nevada and Colorado are inserted to illustrate this difference.

ACTION OF NEVADA BOARD OF PARDONS, 1917–18[1]

Name	Pardoned Term of Board	Crime	Sentence in Years
John F. O'Day	May 1917	Burglary	1 to 15
Gus Price	May 1917	Assault to rob	1 to 14
C. A. Whitaker	May 1917	Robbery	1 to 15
A. N. Stephens	September 1917	Grand larceny	1 to 14
Louis Popovich	October 1917	Grand larceny	2 to 14
Leo Sepulveda	October 1917	Grand larceny	1 to 14

(This is the form in which pardons, paroles, commutations, etc., are reported.)

ACTION OF COLORADO BOARD OF PARDONS, 1917–18[1]

Adams, H. L., No. 9882, Scotch-Irish, age 27, married, waiter, Catholic; sentenced from Denver County, January 29, 1916, by Judge H. P. Burke, to 7 to 10 years for burglary, larceny, and receiving stolen goods.

The evidence showed that this prisoner, in connection with one C. S. Maddox, had burglarized several Denver homes. This prisoner was wanted by the Texas authorities and his sentence was commuted November 13, 1916,

[1] This information has already appeared in print and is not, therefore, of a confidential nature.

to a term of 9 months to 10 years, in order that he might be released to the Texas penitentiary. He asked for an absolute pardon, thinking that if he were released by Colorado the Texas authorities would also release him, as it was claimed that he was suffering from tuberculosis. After carefully considering all the facts, executive clemency was denied April 12, 1918.

Abeyta, Casimiro, No. 8702, Mexican, age 38, married, miner, Catholic; sentenced from Huerfano County, February 11, 1913, by Judge A. W. McHendrie, to a term of 18 to 20 years for murder.

The prisoner, together with Amadeo Gallegos, was found guilty of the murder of Luis Naez. The crime was committed at a dance, when all parties concerned were probably under the influence of liquor. Executive clemency was denied June 8, 1917.

Baragas, Gregorio, No. 7247, Mexican, age 24, single, laborer, Catholic; sentenced from Routt County, October 10, 1908, by Judge John T. Shumate, to life-imprisonment for murder.

The trouble started when prisoner, together with other Mexicans, was working for the Moffat Road. Some of the Mexicans were continually teasing the prisoner, who was a boy then 18 years of age. He states that he thought he was defending himself at the time he killed a fellow Mexican. The sentence was commuted June 8, 1917, to a term of 24 years and 9 months to life-imprisonment, which would permit of his release on parole in about 5 years. This commutation was granted on account of the youth of the prisoner at the time of trial and his excellent prison record.

CHAPTER VI

STANDARDS AND THE PROBLEM OF STANDARDIZATION IN THE ADMINISTRATION OF THE PARDONING POWER

The fundamental principle underlying punishment for crime is that of justice. Justice to the public demands that punishment shall be inflicted because of its general deterrent effects; justice to the offender demands that the penalty shall be proportionate to the offense. How then shall the relativity of the penalty to the offense be determined? This problem is first one of legislation. But our legislatures have but partially succeeded in approximating the degree of the seriousness of crime and in prescribing proportionate penalties. It has well been pointed out by a leading student of legislation that

> In most (American) jurisdictions the criminal law is codified; the codification covers all the common felonies, which are consequently considered in relation to each other, with the effect that there is a tolerable proportionateness of penalties. The differentiation of each generic felony into its possible subspecies is, however, only very imperfectly carried out in American codes. . . . . The American system is to allow a liberal margin between minimum and maximum penalty, with the result that individual estimate is substituted for abstract differentiation. This may be intended to make for better justice, but it is likely to make for greater arbitrariness and chance.[1]

Because of this lack of standardization of generic felonies in our systems of legislation the problem of attempting to determine accurate justice devolved upon the judiciary. In each criminal case a definite and fixed penalty was usually imposed upon the guilty culprit. The judge was called upon to measure the gravity of the offense and mete out justice in the form of a definite and exact sentence But again arbitrariness was likely to occur. Judges upon neighboring benches or judges who succeeded each other on the same bench were likely to arrive at different estimates of the seriousness of similar offenses.

This situation, in connection with advances in the study of criminology, has led to the adoption of the indeterminate sentence in most states. But very few states, among them Arkansas, Maryland, Oklahoma, Virginia, and Wisconsin, have failed to enact some form of the indeterminate sentence law. Such a law, ordinarily, is applicable to

[1] Freund, *Standards of American Legislation*, pp. 258–59.

all offenders except those convicted of treason or first degree murder. In some states other offenders do not come within the scope of its operation. In Connecticut if a convict has twice previously been sentenced to the state prison the court sentences him to thirty years. Persons guilty of rape or kidnaping in Illinois, habitual criminals in Massachusetts, persons guilty of rape by force, or administering poison with intent to kill in Montana, of rape and kidnaping in Nebraska, and persons previously convicted of a felony in West Virginia are not within the operation of the indeterminate sentence law in these respective states.

When a convict is sentenced under the indeterminate sentence law the penalty ranges between the minimum term and the maximum term for the offense of which he is convicted, but a definite term is not fixed. Sometimes the judge pronouncing sentence is required to recommend to the pardoning authority a fixed sentence somewhere between the minimum and maximum extremes, but in most states the judiciary is not called upon to make such recommendation.

Frequently when the minimum term has been served the prisoner automatically is eligible for parole. It was for this reason that Oregon modified its indeterminate sentence law in 1919. As soon as prisoners had served their minimum term in this state they felt that they should be paroled and were discontented and dissatisfied if they were not. Under the new law in that state prisoners are now sentenced without limit, except that the maximum term is fixed in each case.

As a result of the general enactment of the indeterminate sentence law in the American states the problem as to when a convict shall be paroled and finally discharged has been put upon the pardon authorities. This means an enlargement of work and a corresponding increase of discretionary power by such authorities. In addition, the work of pardon authorities is on the increase because of a growing prison population. This gives rise to the problem of standardization. Have pardon authorities developed a logical, systematic plan for the granting of clemency, or is clemency issued according to caprice, individual estimate, or personal judgment?

Certain features connected with the administration of clemency have been quite definitely standardized. Thus in most states a pardon can be granted only after conviction. The power to pardon for treason and impeachment is greatly curtailed and circumscribed. The time and place for holding hearings is fixed. Applicants for clemency must furnish certain required data or information, often on prescribed applica-

tion blanks. Certain requirements concerning publicity of hearings must be complied with, particularly in regard to the publication and posting of notice Statements of facts and opinion are required from the trial judge and prosecuting attorney in some states. Either open or closed hearings are provided for. The powers of pardon authorities to review decisions of trial courts is definitely determined in some states. Some efforts have been made to evaluate evidence. Limitations have been place upon counsel representing applicants for clemency. The frequency of reapplication for clemency has been limited. The use of a seal has generally been required. All of these matters deal chiefly with questions of procedure, however.

A further problem exists in the form of determining the degree of punishment that a convict should undergo. How long should he be incarcerated? When, if ever, should he be paroled or pardoned? Such questions are difficult of solution since it is impossible to measure penalties on an absolutely scientific basis.

An attempt to solve this problem has been made by making release from prison partially dependent upon behavior while in prison. Every state, so far as can be ascertained, has adopted some definite scale for the reduction of time to be served, based upon good behavior. The amount of good time allowed, as it is generally called, varies in different states but is quite liberal in all of them. Some states have prepared rather extensive tables making it possible to see at a glance how much good time is to be deducted for each year or fractional year of incarceration. This method serves the double purpose of putting a premium on good behavior, thereby facilitating the maintenance of prison discipline, and also fixes a definite standard based on behavior for the reduction of sentence.

Illinois has developed a system based on the principle that practically every man committed to prison must at some time be released and again sent into society. Therefore as soon as a person has been incarcerated the system immediately takes hold of him and starts the process of attempted regeneration. As soon as he is committed he undergoes a thorough examination by the prison physician, psychiatrist, and psychologist, each of whom prepares a report. Then the prisoner is called into conference by the prison staff, which explains the progressive merit system to him and formulates a work program for him as a result of the personal examination. Prisoners are divided into five grades: A, B, C, D, E. When first committed each prisoner is placed in grade C. He is eligible to grade B after three months, and after three months

of satisfactory service here he may be placed in grade A. After a three months' service in this grade with satisfaction his case comes automatically upon the docket for a hearing by the Division of Pardons and Paroles.

The grading of a prisoner is based on (*a*) workmanship and (*b*) behavior. The standard of marking in workmanship rests on the sincerity of the prisoner's efforts in producing results as well as on the kind and amount of work produced. His behavior is graded on the basis of the opinion of the prison keeper and prison staff by taking into due consideration the physical and mental capacity of the prisoner together with his general attitude and deportment.[1]

The merit system, as described by the superintendent of prisons, provides that prisoners in preparation for release shall pass through the following preparatory stages: (*a*) confinement within the prison, and subject to all the prison rules, with very little if any personal responsibility; (*b*) increasing opportunity to merit more confidence on the part of prison authorities by strict application to industry and adherence to prison regulations; (*c*) positions of trust within the prison walls; (*d*) life in cottages outside the prison walls, under supervision of the prison officials; (*e*) work on the prison farm, without guards; (*f*) parole.[2]

The prison staff consists of the warden, the assistant warden, the physician, the psychiatrist, the psychologist, and at least two subordinate prison officials who are in close personal contact with the prisoners. This staff holds a daily session, and its deliberations and conclusions are carefully recorded by a secretary. When the Division of Pardons and Paroles is asked to act on a question of clemency involving a criminal in confinement it has before it this entire prison record of each applicant.

For parole purposes the state is divided into ten parole districts. A parole agent is in charge in each district and is in close communication with a parole supervisor at Joliet, Chester, and Pontiac. Each agent makes a daily and a monthly report concerning his activities and the men under his supervision. This information is also in the hands of the Division of Pardons and Paroles when it considers applications for clemency from released criminals on parole.[3]

[1] "Methods and Results of Administration," paper presented by John L. Whitman, Superintendent of Prisons, at the twelfth annual meeting of the American Institute of Criminal Law and Criminology held at Indianapolis, September 17, 1920.

[2] *Ibid.*

[3] *Biennial Report of Illinois Division of Pardons and Paroles, September 30, 1918, to September 30, 1920.*

In this manner a criminal's deportment both within prison and while on parole can be determined quite accurately. The other states have systems more or less like the Illinois system, but the system in this state has been described as a type because it is generally recognized that it is one of the best in the Union.

More progress has been made in standardizing the conditions under which parole will be granted than in the case of other forms of clemency. A prisoner may be eligible for parole after he has served a minimum term in Arizona, Connecticut, Georgia, Idaho, Illinois,[1] Indiana, Kansas, Kentucky, Maine, Michigan, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Washington, West Virginia, and Wyoming.

In Arkansas a prisoner may be paroled who has served one-third of a definite term. No person will be paroled in Connecticut, (*a*) who is serving a life-term, (*b*) who is known to have suffered a previous conviction for felony, (*c*) whose prison record is not such as to afford reasonable probability that he will lead a new life, (*d*) who is serving a time sentence and who has not served at least one-half of the full term, not reckoning time earned by good conduct.[2]

A parole will be granted to no one in Georgia who is serving a life-sentence for treason, arson, rape, or assault with intent to commit rape. No prisoner serving a life-sentence for any other crime will be granted a parole until he has served at least ten full years of his sentence.[3] Prisoners are not eligible for parole in Idaho if convicted of treason or murder in the first degree, or who have served a previous term in any penitentiary.[4] The Board is empowered to establish three grades of prisoners, and no prisoner is released on parole unless he has been for six months a member of the first grade.[5]

In Illinois persons given a definite sentence are eligible to parole as follows: Persons sentenced for life, at the end of twenty years; for less than life after serving minimum sentence for the offense, good time being allowed, but not until at least one-third of the time fixed in the

[1] The rules of the Illinois board also prescribe that a second termer cannot appear before the Division until he shall have served twenty-one months; a third termer cannot appear until he shall have served thirty months; a fourth termer until he shall have served thirty-eight months.

[2] General Statutes of Connecticut, 1918, sec. 2019.

[3] Code of Georgia, 1911, sec. 1224.

[4] Idaho Session Laws, 1909, House Bill No. 214, sec. 8.

[5] Idaho Revised Code, 1908, sec. 8264.

definite sentence has been served.[1] The Parole Board of Iowa may parole any prisoners in the penitentiaries except those serving life-terms. It may also on recommendation of the trial judge and county attorney parole, after conviction and before commitment, persons not previously convicted of a felony.[2] No person who has served two previous terms in any penitentiary is eligible for parole in Kansas.[3] A person committed for life is not eligible for parole in Kentucky until he has served eight years.[4]

The Louisiana Board of Parole cannot parole a life-termer until he has served at least one-third of the actual time he would have served if classed as eligible for reduction of sentence under the laws of Louisiana. The parole, in the case of life-termers, must be approved by the Board of Pardons.[5] In Maryland the Advisory Board of Parole makes its recommendations to the governor in all cases where the parties have served one-third of their term, and in all other cases when requested to do so by the governor. Michigan confers authority to grant parole exclusively upon the governor in all cases of murder, actual forcible rape, for offenses by public officers in violation of their duties as such officers, and to all persons serving sentences for conspiracy to defraud public municipalities, or for bribing or attempting to bribe public officials. In all other cases such authority is conferred upon the Advisory Pardon Board. No person can be paroled in Michigan until a "first friend and adviser," who is not a relative, has been secured.[6]

Any person may be paroled by the State Board of Pardons in Minnesota, provided no convict serving a life-sentence can be paroled unless he has served thirty-five years, less diminution allowed for good behavior, if his sentence had been thirty-five years, and then only by unanimous consent of the Board in writing.[7] In Montana any person receiving an indeterminate sentence may, in the discretion of the governor and the State Board of Prison Commissioners, be paroled at any time after he has served one-half of the minimum term.[8] The provisions of the law relating to parole in Nebraska are not applicable to persons confined for

[1] Parole Act of 1917 as amended and in force July 1, 1919, sec. 1.

[2] Iowa Code, sec. 5718-a 20.

[3] General Statutes of Kansas, 1915, sec. 8187.

[4] Kentucky Statutes, 1915, sec. 3228.

[5] Laws of Louisiana, 1916, Act 125, p. 282.

[6] Public Laws of Michigan, 1917, Number 198, sec. 2.

[7] Laws of Minnesota, 1911, chap. 298, sec. 6.

[8] Session Laws of Montana, 1917, chap. 16, sec. 2.

treason, murder, rape, or kidnaping, nor any person who has served two previous terms in any penitentiary.[1]

The Nevada Board of Parole Commissioners may parole any prisoner who has served one calendar year and who has not been previously convicted of a felony nor has served a term in a penal institution. But no prisoner serving a life-sentence may be paroled until he has served at least seven calendar years.[2] No person who has served two previous terms in a penitentiary is eligible to parole in New Mexico.[3] Prisoners who have served the minimum term in North Carolina, provided it is not less than one-fourth of the term for which they were sentenced, and rank among the prisoners of the first grade are eligible for parole.[4] The following persons can under no circumstances be paroled from the penitentiary in North Dakota: (*a*) a person convicted of first degree murder, (*b*) a person finally convicted in any jurisdiction of a felony other than that for which he is imprisoned, (*c*) a person who has not a good prison record for at least six months previous to parole.[5]

A recent New York statute provides that the parole board may parole or discharge inmates subject to parole at any time, and as of any time after the expiration of any minimum term, upon such conditions not incompatible with the welfare of society as they may deem advisable.[6] The Ohio law provides that prisoners under sentence other than for treason or murder in the first and second degree who have served the minimum term for the crime of which they are convicted, or a prisoner under sentence for murder in the second degree who has served ten full years, may be allowed to go on parole.[7] Any person sentenced to an indeterminate sentence in Oregon may be paroled by the governor upon his own motion, or upon recommendation of the parole board as follows: (*a*) Any person under twenty years of age at the time of the commission of the crime may be paroled at any time. (*b*) Any person over twenty years of age at the time of conviction may be paroled at any time after he has served one-fourth of the maximum term for which he was sentenced, with additional deduction for good time.[8] Prisoners in

[1] Revised Statutes of Nebraska, 1913, sec. 9160.

[2] Nevada Revised Laws, 1912, sec. 7631.

[3] New Mexico Statutes, 1915, sec. 5083.

[4] Public Laws of North Carolina, 1917, chap. 278, sec. 4.

[5] Laws of North Dakota, 1917, chap. 171, p. 236.

[6] Laws of New York, 1919, chap. 198, sec. 1.

[7] Laws of Ohio, 1917, p. 527.

[8] General Laws of Oregon, chap. 150.

Pennsylvania sentenced to definite terms prior to July 1, 1911, are eligible to parole after having served one-third of their sentence.[1] A prisoner may be paroled in Rhode Island unless he is sentenced for life, or is a habitual criminal, whenever he has served not less than one-half of the term for which he is sentenced. A habitual criminal may be paroled after having served not less than five years of the twenty-five years he is required to serve as a habitual criminal. A life-prisoner may be paroled after he has served not less than twenty years, but only by a unanimous vote of the Board.[2]

No convict in South Dakota, except those serving an indeterminate sentence, can be paroled until he has served one-half of his sentence.[3] No life-termer in Tennessee can be paroled until he has served twenty-five years, less good time, had his sentence been for twenty-five years.[4] Prisoners in Virginia who have served one-half of their term and have obeyed the prison rules for the preceding two years may be paroled. Persons serving life-sentences upon third conviction for larceny may be paroled after having served ten years of their term, and persons serving life-sentences for other crimes may be paroled after serving fifteen years of their sentence.[5] In West Virginia the governor may parole a prisoner who has served the minimum term, provided that he has not previously served two terms of imprisonment in any penal institution for felony, and who ranks in the first grade of convicts. No person who cannot read, or write a legible hand, unless more than thirty years of age at the time of sentence, may be paroled.[6]

Paroles may be granted in Wisconsin to those sentenced for less than life who have served at least one-half of their sentence, not deducting any time for good behavior; and to those sentenced for life who have served thirty years, less diminution which would have been allowed for good conduct if the sentence had been thirty years.[7] No person who is sentenced for life in Wyoming is eligible for parole. This is also true of a convict who makes an assault with a deadly weapon upon any official of the prison or other convict, or of a convict who has been

[1] Laws of Pennsylvania, 1913, p. 532, sec. 1.

[2] Rhode Island Session Laws, 1915, chap. 1186, sec. 3.

[3] Session Laws of South Dakota, 1913, chap. 287, p. 485.

[4] Thompson's Shannon's Code, 1918, sec. 7210a–11.

[5] Virginia Code, 1904, sec. 4198a.

[6] West Virginia Code, 1913, sec. 5693. Rules Governing Paroles. Rules 2 and 9.

[7] Laws of Wisconsin, 1919, sec. 57.06.

returned from a parole as a delinquent, or who has served a previous term in any penitentiary.[1]

From this summary it is evident that some progress has been made in fixing rules or precedents which govern in part the granting of paroles. Considerable variation exists in the practice that is followed in the different states, but at least the granting of parole is not a matter wholly of fluctuating opinion and individual determination in those states which have adopted rules that are applied in handling this phase of clemency.

Some states prescribe when a person who is on parole shall be finally and definitely discharged. Arkansas, Idaho, Kansas, and Nebraska provide that after a prisoner on parole has served not less than six months of his parole in a satisfactory manner he shall be eligible for final release or discharge. Georgia, Iowa, and Texas have a similar provision except that the minimum parole period is twelve months. In Arizona and Tennessee a prisoner on parole may be released at any time when such final release will not be harmful to society. In Montana the State Board of Prison Commissioners may grant a final discharge to a person on parole provided the period of parole or probation shall not be less than the minimum or more than the maximum term for which he may be imprisoned. In North Carolina the period of parole is for such a period of time as will fill out the term of imprisonment to which the prisoner may be sentenced.

The Board of Prison Commissioners in Maine determines the length of time a prisoner shall be on parole, which time may be extended or reduced, but which shall not be more than four years in any case. After a prisoner has faithfully performed all the obligations of his parole for the fixed period he is considered fully to have served his entire sentence and is then finally discharged. In Michigan a provision very similar to that in Maine is also in force.

It has been said:

> In relieving the severity of the criminal law, the governor acts as a sort of criminal court of equity, although his judgments and decisions are not yet based on generally understood rules as those of equity jurisprudence, but still rest largely upon his individual conscience or caprice. The practice of different governors in granting pardons, therefore, is likely to vary just as did the measure of the Chancellor's foot. Records of precedents and settled rules for the guidance of the executive are lacking.[2]

[1] Laws of Wyoming, 1909, chap. 84, sec. 3. Rules of State Board of Pardons Relative to Parole. Rule 2.

[2] Mathews, *Principles of American State Administration*, pp. 120–21.

This is generally true. Some rules and precedents have been established which deal with the preliminaries and procedure of clemency hearings. This likewise applies to "good time" allowances, and to the exercise of the parole power. But beyond this point very little has been done in the way of standardization. In response to an inquiry, replies received from over 75 per cent of the pardon authorities in the American states show that the pardoning power has not been standardized, that no systematic method has been worked out as a basis for granting or refusing clemency, that a set of precedents has not been established which is followed in the consideration of each application for clemency, that no method for measuring the gravity of an offense has been devised, and that no conscious or studied effort has been made to prevent instability of policy. It is true that a few pardon authorities stated that they tried to be consistent, but they followed no precedents or standards "except in a general way," and that they aimed to follow an intelligent method as far as practicable, but none of these practices were made a matter of record. The general conclusion that one must draw from these inquiries is that no permanent stability of policy exists, and furthermore, that most of these authorities do not even realize the nature of the problem involved, nor the need for a consistent policy.

In Illinois, where the superintendent of the Division of Pardons and Paroles and the superintendent of prisons have long been engaged in this type of work, it appears that they have built up a system for granting clemency which is consistent and displays uniformity. But the precedents developed rest largely in the memories of the members of the Board rather than in the form of *stare decisis* decisions. A new Board would be entirely free to follow its own ideas and opinions, and probably would find it necessary to do so.

A detailed personal study of this problem in a group of western states—Nevada, California, Oregon, Idaho, Utah, Colorado, and Wyoming—but verifies more strongly the general conclusions that have been stated.

In Nevada the governor, submitting to the legislature the action, of the State Board of Pardons in granting clemency, is not required to give the reasons in each case for such clemency. It is therefore impossible to examine the written reasons in order to see if they are consistent and according to precedent. Information must therefore be gathered from the members of the Board of Pardons. The governor's secretary, who is also the secretary of the Pardon Board, says that the only rules observed are: (*a*) no parole is granted unless the minimum term has

been served, and (*b*) pardons are granted only in exceptional cases unless a parole has first been served. The secretary makes no effort to call the attention of the Board members to their action in similar cases for the reason that they do not want to follow precedent. The vote of each member is made public in every case of clemency granted and therefore the members, who all hold elective positions, are inclined to shape their action so as to gain public approval.

This view is substantiated by the governor, who is the president of the Board. He insists that there is no consistency on the part of the Board members in voting. He says it would be very interesting to see how much diversity exists on the part of the same member in similar cases. Such a member often votes directly opposite to what he has done in a previous case of a similar character. For this reason the governor favors secret voting, instead of having each vote made a matter of public record as is now the case, because it will encourage greater freedom of action. He likewise favors an appointive Board because it will be less inclined to listen to popular feeling in order to secure political favor. The governor strongly favors the standardization of the pardoning power and the establishment of precedents to be followed in considering clemency. He also believes that some system should be evolved for measuring the gravity of an offense. No such methods now prevail in Nevada. He has brought this entire problem before the Pardon Board, which has expressed a willingness to consider the matter, but the Board has intimated that it has little confidence in such a scheme for dealing with clemency.

It is admitted that the pardoning power has not been definitely standardized in California, but a member of the Advisory Pardon Board says the Board aims to be consistent in its action. A set of precedents has not been established as in law (*stare decisis*) since it is felt that this is not wholly possible. The Board sometimes recommends clemency because of the too great severity of the sentence, because of the discovery of new evidence, because of extenuating circumstances, because of a helpless and dependent wife and children, because of the illness of the prisoner, etc. But the Board tries to be consistent in taking all these things into consideration. Sometimes the Board refers to past cases and recommendations in reaching conclusions in new cases. But further than this nothing has been done in the way of establishing and following precedents. The secretary of the Board confirms these conclusions.

The private secretary of the governor says that no effort has been made in the executive office to establish precedents and to standardize

the pardoning power. This view is also held by the state parole officer. An examination of hundreds of cases in which clemency was granted, covering a period of eight and one-half years, shows that there was no deliberate or conscious effort on the part of the chief executive to follow a standard. The reasons for granting clemency in each case contain no reference to similarity of action in other like cases. Each case seems to be treated entirely on its own merits, separate and distinct from other appeals for clemency. No influence of a co-ordinating character is apparent in the governor's actions in these matters. The state constitution provides, however, that neither the governor nor legislature can grant a pardon or commutation in any case where the convict has been twice convicted of a felony except upon the recommendation in writing of a majority of the Supreme Court.[1]

The pardoning power in Oregon is not standardized. No systematic method is followed in granting clemency. Precedents have not been established. Each case is decided on its own merits. No effort has been made to prevent instability of action by the pardoning authorities. These statements are all agreed to by the governor's secretary, by the state parole officer, by the superintendent of the state prison, all of whom are members of the Parole Board, and by the secretary of this Board.

A study of the reasons given for granting clemency in some 1,257 cases during the period from February 2, 1911, to July 15, 1919, during the administrations of Governors West, Withycombe, and Olcott, completely verifies these statements. Not only is there no consistency in the exercise of clemency, but occasionally the reasons for granting it are trivial and unworthy of consideration. Thus in one case where a person was sentenced to be hanged for murder, the wife and daughter pleaded that they did not want him hanged because it would do him no good. The governor agreed with this statement and therefore commuted his sentence. One pardon of a person convicted of obtaining money under false pretenses was granted "because the prisoner is about to be married." One notices in the records such reasons for granting pardons as the following: "the ends of justice have been met," "the prisoner is pardoned for the betterment of society," "he has been punished sufficiently," "he has learned his lesson," "he should have a chance to make a new start in life," "he better be supporting himself instead of the state doing it." During the recent war a number of convicts were pardoned so that they might enlist in the army or navy, or work in the shipyards or in the lumber industry.

[1] Constitution of California, Art. 7, sec. 1.

No standardization exists in Idaho. No precedents prevail. These statements are made by the secretary of the State Board of Pardons, by the governor's secretary, and by the warden of the state prison. An examination of all cases of clemency granted by the Pardon Board since its first session, April 1, 1891, confirm these statements. Occasionally the reasons for granting clemency are trivial, and sometimes no reasons for such action are given, although the giving of reasons is a constitutional requirement. Also in some cases the offense for which clemency is granted is not stated in the record.

It is likewise stated in Utah that the pardoning power has not been put upon a standardized basis with a set of governing precedents. These statements are volunteered by a former governor who was president of the Board of Pardons for eight years, by two members of the Supreme Court who have served on the Board for several years, by the attorney-general who is the secretary of the Board of Pardons, by the warden of the state prison, and by the secretary of state, who sits on the Board when he is acting governor of the state. A study of the records of the Pardon Board since statehood (1896) verifies this conclusion. Very brief reasons are given for granting pardons and commutations, and no reasons are offered for granting paroles and termination of sentence.

The pardoning power is not standardized in Colorado. Policy has fluctuated according to the disposition of the Pardon Board and the governor. The secretary of the Board states, however, that for about ten years the Board has held quite firmly to the practice of not granting a pardon unless it was shown that the applicant was not guilty of the crime for which he was convicted. It also seems that the condition of a prisoner's family is not usually considered in the determination of granting or refusing clemency. The Pardon Board in Colorado is merely an advisory one, and so the final disposition of clemency is vested in the governor. There is no evidence in the record that he follows a set of precedents, and this view is borne out by his secretary and the warden of the state prison. A study of the cases of clemency granted by governors from 1907 to 1919 shows that this conclusion is a correct one.

What has been said in regard to Colorado may also be said about Wyoming. The work of the Board of Pardons is not standardized and a set of precedents has not been developed, according to the secretary of the Board. This Board is advisory in its nature and the governor makes the final decision in clemency matters. The records of his action since 1911 do not indicate that he has consciously followed precedent in the exercise of clemency.

The conclusions derived from this summary are that throughout the American states in general the pardoning power has not been standardized, that a systematic method has not been evolved to be used as a basis for granting or refusing clemency, that a set of precedents has not been established which is followed in the consideration of each application for clemency, that a method for measuring the gravity of an offense has not been worked out, and that no serious effort has been made to prevent instability of policy in clemency matters.

This condition is probably due in the first place to a lack of effort to establish a uniform policy. The pardoning power is generally looked upon as one in which there should be a free exercise of discretion. When justice has miscarried in the other branches of government the pardoning power, it is felt, should be absolutely untrammeled in order that it may insure justice. This is one reason why opposition exists to the establishment of standards and precedents which might curb and restrict the free and just administration of clemency.

A feeling also exists on the part of many pardon authorities that it is impossible to develop rules and standards which can be of general application. Each case, it is asserted, must be determined solely on its merits. This thought is well expressed by the secretary of the State Board of Pardons of Indiana who says, "No precedents have been established or followed in our work; each case must be considered on its own merits." Likewise one of the members of the Prison Commission of Georgia writes: "Since grants of clemency are necessarily made in the exercise of discretion there can be no fixed precedents, for they are exceptions to the rules of law." The director of the Legislative Reference Bureau of Virginia says: "Each case stands on its own merits. Practically no two cases are the same. The granting of clemency or mercy is not, and should not be, controlled by precedents."

A former governor of Utah who was president of the Board of Pardons says it is impossible to standardize the pardoning power, and this view is also held by two justices of the Supreme Court who are members of the Pardon Board in that state, and by the warden of the state prison. They all assert that it is impossible to follow precedent because so much depends upon the individual characteristics and temperament of each prisoner, and on the circumstances surrounding the commission of each crime.

Many similar views have been expressed, but perhaps one of the strongest opponents of the view that the pardoning power can be standardized and subjected to precedent is the pardon attorney in the

United States Department of Justice. He frankly confesses that he does not know what is meant by the standardization of this power. He says that precedents are known in the national system but there is no foot-of-rule guide or yardstick by which applications for pardons are measured and granted or denied. An inquiry of this nature, he insists, shows a lack of comprehension of the proper functions of the pardoning power. He also holds that an attempt to evolve a method for measuring the gravity of an offense is foolish because the pardoning function is not a machine nor can it ever be made one. Finally, on the question of preventing instability of policy in granting clemency, he expresses himself to the effect that such a view is also foolish, for the attempt to apply information or standards which might be practicable in some lines, is wholly impracticable and impossible of application to pardon cases.

If these views are correct then nothing remains to be done except to continue to follow our present methods of administering clemency. This assumes that these methods are as near perfect as they can be made. It also assumes that individual judgment, without resort to standards or precedents, is best able to approximate justice. It means that in spite of the shifting personnel of governors and boards, with a corresponding change in individual viewpoint, in spite of caprice, prejudice, bias, susceptibility to influence, undue sympathy, and other elements in man's environment, pardon authorities shall be allowed unlimited discretion because they are dealing with a subject that can be disposed of in this manner only, and therefore justice demands that they shall not be circumscribed in their activity.

But all students of this problem are not agreed with this point of view. One writes as follows:

> The writer of this letter has been private secretary in the governor's office in —— for the past ten years, and during that time has had considerable to do with many applications for pardon, both those coming to the Board of Pardons and to the governor direct.
>
> My observation brings me always to the same conclusion—that there is need of a change from the old hit-and-miss policy which is pursued in this and many other states. . . . . I am not an idealist but I do feel the necessity of a change in this state in the manner of taking action on pardon applications.

Another student of this problem has said:

> There is no doubt that decision (in clemency cases) is capable of being rendered upon precise and unassailable grounds, since clemency is a definite jurisdiction with guiding rules productive of rational and just results from all standpoints.[1]

[1] W. W. Smithers, "Use of the Pardoning Power," *Annals of the American Academy of Political and Social Science*, LII, 63.

A leading student of criminal law writes:

Pardoning officers should proceed by rule, as do the judges in the exercise of judicial functions. Technically, the power of pardon is termed discretionary; so are a large part of the powers exercised by the courts. With a court, for instance, it is discretionary whether to try a cause when it is reached on the calendar, or to continue it. Yet this discretion should be exercised on public considerations, and according to rule, not from mere private impulses or views. And a judge who should continue causes or bring them on for trial, as personal motives impelled, to the injury of suitors, would be guilty of misdemeanor in office. The same should apply if executives acted on private views in granting or withholding pardons.[1]

Even if it were admitted that the pardoning power does not lend itself to systematic administration to the extent that has been contended for, the statement of Professor Freund relative to the observance of a definite method in reaching determinations is germane to the problem.

In matters not susceptible of scientific demonstration, when either of two different solutions of a problem can equally claim to be reasonable, arbitrariness in reaching conclusions can be best avoided by adherence to intelligible and settled methods which insure a reasonably constant relation between determinations on cognate matters, each of which taken by itself must be the result of compromise or of free choice. This satisfies at least the strong and universal demand for order and proportion. . . . .[2]

The fact also remains that pardon authorities do not enjoy the same degree of discretion in all matters touching clemency that they formerly did. A study of pardon legislation in the United States shows that an increasing number of restrictions have been imposed upon pardon authorities in the form of constitutional and statutory provisions. It would not be contrary, therefore, to American tendencies still further to curtail their discretionary powers if by so doing further improvement could be introduced into our pardon system.

Such an evolution in regard to standardization, establishment of precedents, measuring the degree of criminality of offenses, and formulating a stable policy must be somewhat gradual in each jurisdiction. One could not hope to formulate such a system and superimpose it upon any jurisdiction with any assurance that it would be successful. Just as our system of equity jurisprudence, with its aim of greater justice, was a gradual development, so must a systematized plan for administering clemency develop and establish its own precedents in each state. The aim of any such plan must be to advance certainty, stability, and uniformity, and in so doing insure the greatest degree of justice.

[1] Bishop, *Criminal Law*, 7th ed., sec. 925. [2] Freund, *op. cit.*, pp. 255–56.

Certain suggestive principles may contribute toward the development of such a constructive system of clemency.

A pardoning authority should be guided solely by motives of public consideration. No private motive or view should influence action in matters of clemency. A personal desire to see a prisoner punished or liberated should be absent from the mind of every official called to occupy such a position. And yet in 1913 the governor of Oklahoma used his clemency power to thwart the enforcement of legislation. He took the position that the legal execution of the death penalty was judicial murder and therefore he refused to permit this sentence to be carried into effect on the ground that he would become a party thereto.[1]

Clemency should be exercised only when in obedience to a rational interpretation of common public sentiment the case by reason of natural equity raises a presumption that it was intended to be excepted out of the general terms of the punishing statute.[2]

A person who applies for clemency should be presumed to be guilty by the clemency authorities. When a person is on trial before a court he is entitled to all reasonable doubt and is presumed to be innocent until he is proved guilty. But this rule should be reversed when his case is presented for executive clemency. The presumption is that he has had a fair trial and a just sentence. The burden of proof in showing otherwise should rest upon him.

Pardon authorities should not interfere to correct mere errors of law which may be remedied by an appellate court. Applications for clemency should not be considered until the final determination of a criminal case by the courts. Findings by the jury upon disputed questions of fact should usually be regarded as conclusive. Newly discovered evidence of the innocence of a prisoner should be accepted, if relief based upon it cannot be secured in a court. Consideration should be given to cases in which conviction was had in part because of the rigidity of criminal procedure, false evidence, perjured testimony, or weakness of circumstantial evidence.

It should not be the province of pardon authorities to attempt to rectify what may be regarded as an error in the original trial. This should be left for an appellate court.

Where real doubt of constitutionality has been judicially expressed either in some similar case or by a dissenting opinion, although not sufficient by that

[1] *Henry* v. *State*, 10 Okla. Crim. Rep. 369.

[2] Smithers and Thorn, *Executive Clemency in Pennsylvania*, p. 112.

fact alone, it may be treated as a favorable circumstance when the application is accompanied by other merciful features.[1]

The recommendations of the trial judge and the prosecuting attorney should carry considerable weight, and it might be well, through statutory enactment, to require that immediately after conviction in each case of felony the opinions and recommendations of these officials be transmitted to the pardon authorities and filed for future reference.

There is also a class of statutes which have been intemperately passed to render more severe the existing penalty for some well-defined criminal act. They are usually the outcome of public indignation aroused by the crime in question having been committed in a single instance with revolting details or circumstances of especial aggravation. After subsidence of the popular wave the new penalty is recognized as unreasonably severe.[2]

If no latitude exists in imposing sentence for such a crime it is possible that a person guilty of the offense, but without the revolting details, has been too harshly dealt with. Under such circumstances a commutation of sentence could well be considered by pardoning authorities.

There are also some recent laws which are repugnant to the public sense of right because they declare certain actions to be crimes irrespective of criminal knowledge or wrongful intent. These are opposed to the traditions of the criminal law and the common understanding of the people although occasionally upheld by modern judicial interpretation.[3]

Where the commission of such acts do not involve moral turpitude, and they are committed in ignorance of the law, leniency should be shown if the court, with a knowledge of these conditions, was unable to grant relief.

At times offenses are committed under extenuating circumstances, under extraordinary provocation, or in the belief that they are justified on high moral or religious grounds. But such occurrences can properly be explained at the time of trial, and should be brought to the attention of clemency authorities under extraordinary circumstances only. Clemency may sometimes be extended on the grounds of public policy. Such action may be in recognition of courtesies due to other state executives, in order to allow a prisoner to be tried for a more serious offense in some other jurisdiction, or to secure a witness who will turn state evidence, and for other like reasons.

Caution should be used in pardoning or releasing prisoners on the ground of poor health or serious illness. Some abuse has resulted from

[1] Smithers and Thorn, *op. cit.*, pp. 116–17. [2] *Ibid.*, p. 117. [3] *Ibid.*, p. 116.

this practice. But there are occasions when a prisoner with an incurable disease is a direct menace to the health and safety of other prisoners who live in close quarters. If no other method of solving such a situation exists it may be an act of mercy to others as well as to the individual applicant to grant clemency in some form in such a case.

Juries should not be encouraged to find prisoners guilty and then recommend them to the mercy of the court, or trust that the clemency authority will grant leniency. Jurors should face the problem squarely. A recommendation to mercy merely stimulates petitions for clemency. Except upon the allegation of entire innocence clemency appeals should not be considered where a short sentence has been imposed. Otherwise pardon authorities are burdened with a multiplicity of applications which tends to prevent careful consideration of each case. For the same reason rehearings should not be allowed too often, and then for some new and substantial reason only.

Even if an application for clemency is otherwise meritorious no favorable action should be taken if the applicant's prison conduct has been bad. The preservation of effective prison discipline is essential and therefore compliance with prison regulations should be made a qualification for clemency.

Studies in criminology and penology have thrown much new light and information upon the criminal classes. This knowledge should not be neglected in an effort to systematize the pardoning system. More is now known about different types than formerly. Criminals who have been classified as (*a*) accidental, (*b*) eccentric, (*c*) insane, (*d*) moral imbecile, (*e*) instinctive, (*f*) criminals by acquired habit, (*g*) criminals by passion, (*h*) criminals by occasion[1] (other classifications have also been made), must obviously be handled in various ways, but this does not mean a lack of system. It means the development of a system with more scientific application and individualization of punishment. It means the application of that system to the criminal rather than to the crime as has too often been the case in the past. The new sciences of psychology and psychiatry should be valuable aids in the realization of this end, for pardon authorities must deal with the abnormal and subnormal as well as with the normal criminal. Provisions must also be made to apply the rational principles thus developed to the prisoners who were incarcerated several years ago under the old criminal laws. And since the chief aims of imprisonment and punishment are the protection of society and the reform of the criminal when that is

[1] Henderson, *Dependents, Defectives, and Delinquents*, pp. 219–24.

possible, an effort should be made through an adequate parole system to rehabilitate those persons who can again be returned to society so that they may once again function usefully with their fellows.

But the application of a system of clemency to the individual involves also a more systematic study of crimes and penalties. Not only must there be a co-ordination of penalties as between crimes, but a more scientific differentiation of degrees of crime. A method should be developed for measuring the gravity of an offense. This might be based in part on the value of the interest affected, on criteria relating to the offender, and on circumstances connected with the commission of the offense.

But a standardized system with scientific application of the same to each individual case involves one additiona need. The pardoning authority must be competent, trained, and expert Most of our pardoning officials today are not specially prepared and trained for this duty. In many instances pardon boards and commissions are composed of state officials holding other political positions. Most of their time and attention are given to other duties. Serving on clemency boards is a subsidiary duty. Little time and thought are given to clemency matters.

Likewise governors are not specially fitted to be the final arbiters of clemency as they are in many states. They are elected on other issues. Many of them, prior to their election, have given no serious thought to the problem of clemency. At best they can but hope to use good average judgment when they are called upon to deal with this question. They bring with them no expert knowledge or training to aid in its solution. Therefore they are handicapped from their first entry into office. But this is not all. The chief executives in American states can give less attention to this matter today than they could formerly. The social, industrial, and economic development within each state has become so intricate that governors are confronted with more numerous and complex administrative problems than ever before. The greater part of their time must be given to these duties. They do not and cannot give that degree of attention to clemency which this subject demands and should have. This becomes increasingly apparent when it is recalled that the population of each state is growing. This growth in connection with a more complex social environment results also in an increased criminal population. This means therefore that the task of administering clemency is growing, and the time which a governor has to devote to this duty is becoming less. Evidently the present

organization of the pardoning authority in most American states is poorly adapted to the increased responsibilities it is called to meet.

A board composed of competent members whose full time is given to the state would seem to offer the best solution. Such a board might consist of a superintendent of pardons and paroles, a superintendent of state prisons (or if a state has but one prison, then the warden of such prison), the chief parole agent of the state, a competent criminologist, and a skilled alienist. Its tenure should be permanent. None of the members should be political appointees. The powers of the board should be inclusive. Its conclusions should be final—not advisory. The governor should be relieved of the entire problem of the administration of clemency and this work in its entirety should be given into the hands of such a trained body with final powers of determination.

It will probably be contended that such an organization is desirable in a rich and populous state, but that a state with limited financial resources cannot afford to employ experts for this purpose, especially since, in some instances, the work of the pardon board would not require their entire time. But these experts could also be used to excellent advantage in other branches of the public welfare service. If their efforts were devoted to the more scientific administration of state mental hospitals, boys' and girls' reformatories, county jails and other penal institutions, and in other fields of social welfare work an outlet could be found for their surplus time.

With such a reorganization of the clemency power it is almost needless to point out that a permanent secretary should be provided, and that a comprehensive and consistent method of preparing and filing clemency records should be developed. Such records and statistics would be of great value in helping to establish precedents and in furnishing information for future scientific legislation.

Such a reorganization of the clemency authority would not mean necessarily a curtailment of clemency. Indeed it is difficult to say that the pardoning power has been too freely exercised in general. Governors Seymour, Tilden, Robinson, Fenton, Cleveland, and Hill of New York were all of the opinion that they had not exercised it freely enough.[1] It would mean a more scientific and efficient administration of clemency with greater exactness and justice than under our present methods.

Finally, some problems of clemency which now come before pardon authorities should be disposed of before they ever reach that stage. Some of these agencies should be made use of in our judicial

[1] David B. Hill, "The Pardoning Power," *North American Review*, CLIV, 62.

system. New York has recently enacted a statute that extends the judicial discretion to suspend sentence or put on probation in every case of crime except murder, irrespective of whether the defendant is a new offender or an old one. Some other states such as Kansas have also partially done this. If adequate methods can be introduced into our judicial system which will accurately aid in the determination of the degree and kind of treatment or punishment to be imposed on each guilty defendant, a considerable advance will have been made in the perplexing problem of adequate and just punishment.

CHAPTER VII

SOME LEGAL ASPECTS OF THE PARDONING POWER

THE NATURE OF A PARDON

Blackstone has said that

The effect of a pardon (under the rules of the common law) is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon.[1]

The Supreme Court of the United States has also said that

A pardon reached both the punishment prescribed for the offense and the guilt of the offender. . . . . It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . . It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity.[2]

Is a pardon the remission of guilt, or the remission of the punishment of guilt? The view of the Supreme Court as expressed in the case of *Ex parte* Garland seems to hold that the consequences of a pardon involve the remission of both guilt and punishment. Early English precedents do not seem to indicate that this was the conception of the scope of the pardoning power which then prevailed. Professor Williston has called attention to a number of early English cases that tend to prove this assertion.[3] Bracton, in the thirteenth century, wrote:

For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot

[1] 2 Blackstone, p. 402.

[2] *Ex parte* Garland, 4 Wall. 333, 380. (NOTE.—Frequent references are made to the decisions of the federal judiciary although this study does not deal with the national pardoning power. These cases are cited for the reason that the legal aspects of this problem are similar in the states and the nation, and because state courts are often guided by precedents established by the federal courts.)

[3] Samuel Williston, "Does a Pardon Blot Out Guilt?" *Harvard Law Review*, XXVIII, 647.

give by his own grace. Likewise a person justly and duly outlawed is not restored to anything except to the king's peace, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for he is like a new-born infant and a man as it were lately born. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously limited and confirmed, and accordingly neither to his inheritances, nor to his tenements to the prejudice of the lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them by preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in a worse condition.[1]

It has also been said that

The king could not protect the manslayer from the suit of the dead man's kin. Even when pardon was granted on the score of misadventure, this suit was saved by express words. Proclamation was made in court inviting the kin to prosecute, but telling them that they must come at once or never.[2]

In describing the status of a criminal who had been pardoned, Lord Coke said in 1614 that "he is not a fit person to serve on a jury" and also "by the same reason the testimony of such an one for a witness is in all cases to be rejected."[3]

In the following year in the case of *Cuddington* v. *Wilkins*, Hob. 67, 81; s.c. Brownl. & G. 10, Cuddington sued Wilkins for having called him a "thief." Although he had been convicted of this crime he pleaded that he had received a general pardon from the king. By reason of this fact the court held for the plaintiff.

But two years later in discussing this case the court said,

It was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain after he be cured or manumised, but that he had been a thief or villain he might say.[4]

This decision was contrary to Coke's opinion that a pardoned criminal could not testify, but this did not mean that such testimony was unquestioned. In Bacon, Abr., title Pardon (H), it is said: "A pardon restores a man to his credit so as to enable him to be a witness, but yet his credit must be left to the jury." And in Rookwood's Case, Holt 683, 685, Justice Holt said, "The pardon restores him to his

[1] Bracton (Twiss's translation, II, 371).

[2] Pollock and Maitland, *History of English Law*, II, 481.

[3] *Brown* v. *Crashaw*, 2 Bulst. 154. [4] *Searle* v. *Williams*, 2 Hob. 288, 294.

former capacity," but, "the conviction indeed might be objected to his credit."

In discussing the significance of these statements and decisions which he has presented in his article Professor Williston has said:

> The true line of distinction seems to be this: The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.
>
> The importance of the distinction suggested may be illustrated by modern decisions which generally support in their results the argument here advanced, but often not without finding some trouble to escape from the effect in *Ex parte* Garland and similar statements to the effect that a pardoned convict is to be treated as if he were innocent.[1]

It may be, as Professor Williston has pointed out, that the reason courts have held to the view expressed in *Ex parte* Garland has been the hardness and rigidity of the criminal law. No new trial was obtainable in the case of felony under the English law.[2] This situation was not remedied until the creation of a court of criminal appeal in 1907. In case a person was unjustly convicted a pardon furnished the only remedy. In order to undo an injustice in such a case the practice was perhaps resorted to of saying that a convict who was pardoned had his guilt blotted out and in the eyes of the law he was "as innocent as if he had never committed the offense." In the United States a new trial could more readily be secured if the order was made before the end of the term, but it is still difficult to do so after the term has expired in which the conviction was had.[3]

Yet the view of the nature of a pardon as expressed in *Ex parte* Garland seems to be extreme and far-fetched. A much more reasonable and consistent doctrine seems to have been announced by a federal district court as follows:

> After a pardon there is "oblivion" as to the past. If, however, there be any "oblivion," it is not as to the actual happening of things, but as to the attending consequences. Amnesty or pardon obliterates the offense at least to such extent that for all legal purposes the one-time offender is to be relieved

[1] Samuel Williston, *op. cit.*

[2] *Regina* v. *Murphy*, L.R. 2 P.C. 535.

[3] *United States* v. *Mayer*, 235 U.S. 55.

in the future from all its results; but it does not obliterate the acts themselves. It puts the offender in the same position as though what he had done never had been unlawful; but it does not close the judicial eye to the fact that once he had done the acts which constituted the offense. A pardon or amnesty secures against the consequences of one's acts, and not against the acts themselves; it involves forgiveness, not forgetfulness.[1]

But a pardon may not always offer sufficient relief. For example in a case in which a pardon had been granted to a person who had pleaded guilty through fear of mob violence the court held that the power of pardon did not deprive a court of the right to hear and determine such a case.[2]

OFFENSES SUBJECT TO THE PARDONING POWER

Almost the entire range of crime falls within the pardoning power in the United States. The only offenses that are generally withdrawn from the usual pardon authority are treason and impeachment. This practice of excepting impeachment is at variance with English practice. In England a pardon cannot be pleaded as a bar to impeachment. Resolutions to this effect were passed as early as 1679 and 1688 by the House of Commons. The Act of Settlement (12&13 Wm. III) provided "that no pardon under the great seal of England be pleadable to an impeachment by the Commons in Parliament." But Blackstone held that the king's power to pardon was not subject to curtailment after an impeachment had been decided and sentence pronounced. Dicta to the same effect is found in some American decisions. (*Ex parte* Wells, 18 How. 307; *Commonwealth* v. *Lockwood*, 109 Mass. 323; *Sterling* v. *Drake*, 29 Ohio St. 457). This is not the case in the United States or in the American states.

This can perhaps be explained because of the difference in the penalty in England and in America. In England the judgment pronounced in the event of the impeachment charges being sustained may extend to the entire punishment which the law attaches to the offense. In the United States it involves removal from office only, and possible disability to hold future office.[3]

The question has been raised whether the pardoning authority can pardon for contempt of court. It has generally been held that a contempt of court is an offense against the state and not against the judge

[1] *United States* v. *Swift*, 186 Fed. 1002.

[2] *Saunders* v. *State*, 85 Ind. 318.

[3] *Ruling Case Law*, XX, 535–36.

personally. Therefore the state may act through another branch of government and exercise its power of clemency if it so desires.[1]

It has been held that a territorial governor, although empowered to pardon for violation of territorial law, cannot set aside an order which disbars an attorney for unprofessional conduct.[2] It has also been ruled that the president of the United States cannot pardon from imprisonment judges who have refused to obey a mandamus which directed them to levy a tax necessary to meet a judgment rendered against a county. This was on the ground that the proceedings in question were for the purpose of protecting the legal rights of the suitors which the president could not release, and were not executions of the criminal law.[3] Yet it has been held that the president may remit a fine imposed for contempt in violating an injunction when the court had ordered the fine to be paid to the plaintiff for "the reimbursement of his expenses in the attachment proceedings in respect of such contempt."[4]

In a Nebraska case the defendant was imprisoned for failing to pay a sum of money for the support of his bastard child. It was ruled that the governor could not pardon the defendant because the crime of bastardy did not exist under statute law in that state and there were no common law crimes. It was therefore held that a pardon under such circumstances would have operated as a release from a civil obligation.[5]

It has generally been held that a state governor cannot pardon nor remit a fine imposed on one who has violated a municipal ordinance unless this power has been conferred upon him definitely. It is true, however, that many state offenses are tried in police or municipal courts, and in all cases of conviction in these instances the governor or pardoning authority may exercise the pardoning power.[6]

A pardon may be granted to one convicted of maintaining a nuisance, but such pardon does not authorize the continuance of the nuisance. Only transient nuisances are pardonable.[7]

[1] *In re* Mullee, Fed. Cas. No. 9911 (7 Blatchf. 23); *State* v. *Sauninet*, 24 La. Ann. 119; *Ex parte* Hinkey, 4 Smedes & Marshall 751 (12 Miss. 751); *Sharp* v. *State*, 102 Tenn. 9; *Contra. Taylor* v. *Goodrich*, 25 Tex. Civ. App. 109.

[2] *Ex parte* Browne, 2 Colo. 553.

[3] *In re* Nevit, 54 C.C.A. 622.

[4] *In re* Mullee, Fed. Cas. No. 9911.

[5] *Campion* v. *Gillan*, 79 Neb. 364.

[6] *Paris* v. *Hinton*, 132 Ky. 684; *Allen* v. *McGuire*, 100 Miss. 781; *State ex rel.* v. *Renick*, 157 Mo. 292.

[7] *Thomas* v. *Sorrell*, Vaughn 333.

It has been held by a unanimous decision of the United States Supreme Court that a witness who refuses to accept an unconditional pardon does not thereby lose his right of refusing to incriminate himself.[1] It may be true that the acceptance of a pardon implies that the benficiary is guilty, but this would also hold true of one who avails himself of the advantages of statutes of immunity. Since these latter have been upheld by the courts, and since a witness is protected against punishment in either case, it would appear that the state should have the right to obtain and use his testimony.

WHO MAY EXERCISE CLEMENCY

In the American system of government the pardoning power is not inherent in any state officer or department. Therefore the people in the framing of a constitution may lodge the pardoning power in that branch of government which, in their opinion, will most efficiently exercise it.[2] It is not necessarily an executive function, and if the constitution is silent it vests no more power in one branch of the government than another.[3] Most pardons proceed from the Crown in England and yet it has been regulated by statute from time to time; and pardons, both general and special, have been granted by acts of Parliament.[4]

In the United States the pardoning power is intrusted in most instances to the executive branch of government and yet it appears that pardons, and especially amnesty, have been granted by state legislatures.[5] The weight of authority holds, however, that a legislature cannot grant a pardon after conviction.[6] In Massachusetts the General Court cannot commute punishment after sentence.[7] In Missouri the pardoning power belongs exclusively to the executive department.[8] In Florida the clemency power cannot be exercised by the legislature.[9] The same is true in Tennessee.[10] Likewise in the national government it has been held that the president's power of pardon is not subject to

[1] *Burdick* v. *United States*, 236 U.S. 79.

[2] *Laird* v. *Sims*, 16 Ariz. 521.

[3] *State* v. *Nichols*, 26 Ark. 74.

[4] Bishop, *Criminal Law*, 7th ed., sec. 899.

[5] *Bird* v. *Breedlove*, 24 Ga. 623; *State* v. *Blalock*, Phillips 242; *Haddix* v. *Wilson*, 3 Bush. 523; *Michael* v. *State*, 40 Ala. 361; *State* v. *Keith*, 63 N.C. 140; Greathouse's Case, 2 Abb. U.S. 382; *State* v. *Dunning*, 9 Ind. 20.

[6] 34 L.R.A. 251.

[7] *In re* Opinion of Justices, 14 Mass. 472.

[8] *State* v. *Sloss*, 25 Mo. 291; *State* v. *Todd*, 26 Mo. 175.

[9] *Singleton* v. *State*, 38 Fla. 297.

[10] *State* v. *Fleming*, 26 Tenn. 152.

legislation, and that Congress cannot limit the effect of his pardon, nor exclude from its exercise any class of offenders.[1]

Yet it has been held that an act giving to parties imprisoned for non-payment of fines the benefit of laws for the relief of insolvent debtors and authorizing their discharge as such is not an attempt to deprive the governor of the pardoning power and to vest it elsewhere.[2] Likewise it has been held that a statute providing for the reduction of the term of imprisonment because of good behavior is to be regarded as a part of the sentence imposed, and is not therefore an invasion of the governor's power of clemency.[3] The Supreme Court of the United States has upheld a Congressional statute granting immunity from prosecution to witnesses who were compelled to testify. Although the Constitution confers upon the president general clemency power yet the Court held that this did not deprive Congress of the power to pass acts of general amnesty, and the Congressional statute in question was regarded as an act of this character.[4] It has also been held in state courts that the legislature may grant general amnesty.[5]

The power to issue general amnesty is not confined to the legislative branch of government. Chief Justice Taft while solicitor-general of the United States rendered an opinion that the president had the constitutional power, without authorization by Congress, to issue a general pardon or amnesty. He argued that the president could pardon an offender because his offense was one of many like offenses.

> He may, for the same reason, grant, by separate acts of pardon, immunity from punishment to each of a thousand such offenders. If he may do so, it is difficult to see why he does not exercise the same power, when by public proclamation he extends a pardon to ten thousand offenders, without naming them, but describing them as persons committing or participating in the same kind of offenses. The right to pardon is not dependent on the existence of any particular grounds in the case of each offender. Therefore pardon or amnesty may be granted if the grantor is certain, the extent of the grant is certain, and the grantees are so described that they can be made certain.[6]

In support of this view Mr. Taft sketches the historical use of this power. In 1794 the whisky insurrectionists were pardoned by President Washington through a proclamation of amnesty. The president also authorized General Lee, who was the commander-in-chief of the forces of the United States, to issue a similar proclamation. Governor Mifflin

[1] *United States* v. *Klein*, 13 Wall. 128.

[2] *Ex parte* Scott, 19 Ohio St. 581.

[3] *Ex parte* Wadleigh, 82 Cal. 518.

[4] *Brown* v. *Walker*, 161 U.S. 591.

[5] *State* v. *Bowman*, 145 N.C. 452.

[6] *Opinions of Attorney-General*, XX, 332.

of Pennsylvania issued a similar pardon to these rebels for their acts against this state. In 1800 President John Adams issued a general proclamation of amnesty to these same offenders. President Madison pardoned through proclamation a group of smugglers and violators of the federal revenue laws, known by the name of the "Barataria" pirates.

Congress by an Act of July 17, 1862 (12 Stat., 592) authorized the president to grant amnesty to persons who were participants in the rebellion, on such conditions as he deemed expedient. President Lincoln did this by a proclamation on December 8, 1863, but he distinctly asserted that he did it by virtue of his constitutional power and not because of grant by Congress. Several pardon proclamations, limited in their scope, were issued by President Johnson during the early part of his administration. In January, 1867, the amnesty section of the Act of 1862 was repealed by Congress (14 Stat., 377). In spite of this he issued another limited pardon proclamation on September 7, 1867. Then he issued a full and absolute pardon by proclamation, July 4, 1868 (15 Stat., 702), which applied to all rebels except those that had been indicted for treason. Finally on Christmas day, December 25, 1868, he issued a proclamation (15 Stat., 711) in which he granted a complete and unconditional pardon to all who had taken part in the rebellion. Presidents Johnson and Grant on July 3, 1866, and October 10, 1873, respectively, issued proclamations of pardon to all deserters who should return to the army.

In the case of *United States* v. *Klein* (13 Wall. 128) the court made the following remark in reference to the amnesty clause of the act of July 17, 1862: "The suggestion of pardon by Congress, for such it was rather than authority, remained unacted on for more than a year." In the case of *Armstrong* v. *United States* (13 Wall. 154) where the claimant's rights were based entirely on President Johnson's proclamation of December 25, 1868, the Supreme Court said: "The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect."

This scholarly opinion of Mr. Taft makes it clear that the president may grant an absolute and general pardon or amnesty without legislative authorization.[1] The ruling of the Supreme Court in these cases has also

[1] "Opinion on Power of the President to Grant Amnesty" by Solicitor-General William Howard Taft in *Opinions of Attorney-General*, XX, 330–45.

been followed in both federal and in some state courts in subsequent cases.[1]

Although the clemency power of the legislative branch of government is much limited and curtailed, yet the legislature, it would seem, may exercise clemency in an indirect way. The legislature may repeal the statute creating an offense. All pending prosecutions must fall, and all prior offenses not yet prosecuted are wiped out by such repeal. Yet this result is not quite so full as if it had been accomplished by means of a pardon, for "after a pardon has been granted and accepted it cannot be withdrawn, whereas after a statute has been repealed a new statute may authorize prosecution for an offense committed under it before the repeal."[2]

The extent to which the judiciary may suspend sentence and place on probation a person convicted of violation of law is a matter on which opinion is divided. By some it is held that such action is an invasion of the pardoning power of the executive. It has been held in a federal court that if a sentence is indefinitely suspended by a court, such suspension has the effect of condoning and pardoning the offense and is therefore void because it is an exercise of the pardoning power.[3]

In Indiana it was ruled that an act authorizing the Supreme Court on an appeal after conviction to suspend the sentence of death or to remit forfeitures was void.[4] But it has also been held in the same state that the supreme court may grant a stay of execution in a capital case when necessary to investigate questions presented by the record independently of any statute granting such right. This, it was held, is not an invasion of the governor's pardoning power, for the act is not a reprieve within the meaning of the constitution.[5] A later Indiana statute authorizing criminal courts to suspend sentence and parole convicted persons was interpreted not to authorize courts to suspend sentence and parole after final judgment had been rendered, nor to suspend the collection of a fine after entry of final judgment had been made.[6] In Oklahoma it was held that a trial judge after granting an appeal in a capital case cannot stay the execution of judgment.[7]

[1] *Pargoud* v. *United States*, 13 Wall. 156; *Carlisle* v. *United States*, 16 Wall. 147; *Knote* v. *United States*, 95 U.S. 149; *State* v. *Sloss*, 25 Mo. 291; *State* v. *Fleming*, 7 Humphreys 152; *Haley* v. *Clark*, 26 Ala. 439; *People* v. *Moore*, 62 Mich. 496.

[2] Bishop, *Criminal Law*, 7th ed., sec. 901.

[3] *United States* v. *Wilson*, 46 Fed. 748.

[4] *Butler* v. *State*, 97 Ind. 373.

[5] *Parker et al.* v. *The State*, 135 Ind. 534.

[6] *State* v. *Smith*, 173 Ind. 388.

[7] Opinion of the Judges, 3 Okla. Cr. App. 315.

On the other hand it has been ruled in Kansas that the discretionary action of a judge is not open to review who paroles a prisoner under a statute which authorizes such action when he is satisfied that such person may be paroled.[1] A Nebraska statute providing that a magistrate might release a prisoner or remit the fine of a person convicted before him for intoxication on condition that such person give evidence under oath as to when, where, and of whom he received the liquor was held not to be an infringement of the pardoning power. The reasoning of the court was that one requirement was substituted for another and therefore it was not the grant of a pardon.[2]

It is generally agreed that a governor who has been impeached cannot grant clemency until after the removal of the disability.[3] A pardon is valid when granted by a person who is a *de facto* governor although his title to the office is not perfect.[4] But a pardon granted by one who is merely claiming to hold over after expiration of his term as governor, and after he has done acts and made declarations which are the equivalent of a resignation or a disclaimer to hold office is void.[5] If the governor is absent from the state the lieutenant governor is invested with full power to grant clemency.[6] The attempt of a lieutenant governor of Oklahoma to exercise this power under these conditions met with vigorous opposition by the governor.

APPLICATION, ISSUANCE, AND REQUISITES OF PARDONS

Although notice of intention to make application for a pardon was required in Nevada yet it was held that when application was made after the term of imprisonment was ended no such notice of intention was required.[7] A New York statute provided that before application for a pardon could be presented, notice must be served on the district attorney, and that proof of such service must be presented to the governor. Yet the omission to give such notice, it was held, did not deprive the governor of authority to act since it did not depend upon an application being made in a particular way.[8] In Massachusetts the governor can only grant clemency with the advice of the Council. But he is not required on the presentation of a petition for pardon or

[1] *State* v. *Nite*, 81 Kan. 204.

[2] *Pleuler* v. *State*, 11 Neb. 547.

[3] *People ex rel. Robin* v. *Hayes*, 143 N.Y.S. 325, 149 N.Y.S. 250, 163 N.Y.S. 725.

[4] *Ex parte* Norris, 8 S.C. (8 Rich.) 408.

[5] *Ibid.*

[6] *Ex parte* Crump, 135 P. 428; *Stewart* v. *State*, 146 P. 921; *Ex parte* Cullins, 11 Okla. Cr. 644.

[7] *State* v. *Foley*, 15 Nev. 64.

[8] *In re* Edymoin, 8 How. Prac. 478.

commutation of sentence to refer such petition to the Executive Council unless he considers it his duty to exercise the pardoning power.[1]

In Missouri it has been ruled that a pardon must accurately describe the offense to be pardoned in order to be valid.[2] Yet in Michigan it has been ruled that the validity of a pardon is not affected by the fact that it mistakenly states that the prisoner has been sentenced, that it is not addressed to the court which has the prisoner in its custody, that it fails to state the date of his conviction, and that only the initials of the governor's Christian names are given.[3] The incorrect spelling of the prisoner's surname to whom it was granted has been held not to vitiate a pardon.[4] Looseness in the description of the offense pardoned has also been permitted in Texas. In one case the record of conviction showed that the defendant was convicted of the "theft of a steer" in the June term of court. But the pardon described the offense as "cow-stealing" and stated that it was in the September term of court in which the conviction was obtained. The court held that the pardon was valid in the absence of fraud.[5]

A pardon or commutation of sentence is not void because there is no entry of it made in the office of the secretary of state, although he is required by law to keep a register of the official acts of the governor.[6] But a pardon issued without a seal is void when the law requires that pardons granted by the governor shall be under seal.[7]

In some states, as well as in the national government, the chief executive may grant a pardon before as well as after conviction. This, however, cannot mean that a pardon can be extended before an offense is committed, for such immunity would be in the nature of a license to commit crime. President Lincoln stated a year after his Amnesty Proclamation of December 8, 1863, that the rebels could still avail themselves of its privileges. It would seem that this could not apply to illegal acts committed after December 8, 1863.[8] When clemency may be granted before as well as after conviction the general doctrine seems to be that it may be remitted either before judicial proceedings are

[1] *In re* Opinion of the Justices, 190 Mass. 66.

[2] *Ex parte* Higgins, 14 Mo. App. 601.

[3] *Spafford* v. *Benzie Circuit Judge*, 136 Mich. 25.

[4] *In re* Edymoin, 8 How. Prac. 478.

[5] *Hunnicut* v. *State*, 20 Tex. App. 632.

[6] *Ex parte* Reno, 66 Mo. 266.

[7] *Sutton* v. *McIlhany*, 1 Ohio Dec. 235.

[8] Bishop, *Criminal Law*, 7th ed., sec. 904.

begun, while they are pending, after their termination, or after punishment has been partly or fully endured [1]

Most state constitutions provide that clemency can only be granted after conviction Legally a conviction results from a plea of guilty or a verdict of guilty. Therefore a pardon may be granted in such instance before sentence is pronounced as well as after.[2] Likewise a pardon granted after conviction but pending an appeal to a higher court is valid.[3] The pardoning authority also has the power to pardon an offense although the term of imprisonment has expired, so long as any of the legal consequences remain.[4]

A pardon is not complete and is of no effect until it has been delivered and accepted.[5] Since a pardon is an act of grace it must be accepted for it is in the nature of a deed.[6] "Delivery and acceptance are complete when the grantor has parted with his control of dominion over the instrument with the intention that it shall pass to the grantee, and the latter assents to it either by himself or by agent."[7] What constitutes delivery of a pardon has resulted in some discussion. It has been held in one state that the delivery of a pardon by the governor to the prisoner's attorney is a constructive delivery to the prisoner. The return of the pardon to the governor at his request by the sheriff to whom the pardon had been sent for execution does not destroy the validity nor effectiveness of the pardon.[8] Constructive delivery to the prisoner has occurred, it has been held, when the governor delivers a pardon to one who sues for the release of a prisoner.[9] In one case a pardon was sent by the governor to a prosecuting attorney. The latter used this as a basis for examining as a witness the criminal who was to receive the pardon. The witness did not repudiate this act but exercised his right to testify by virtue of

[1] *State* v. *Woolery*, 29 Mo. 300.

[2] *Spafford* v. *Benzie Circuit Judge*, 136 Mich. 25; *Ex parte* Collins, 94 Mo. 22; *Parker* v. *State*, 103 Tenn. 547.

[3] *Commonwealth* v. *Lockwood*, 109 Mass. 323; *State* v. *Alexander*, 76 N.C. 231; *Gilmore* v. *State*, 3 Okla. Cr. 639; *State* v. *Garrett*, 135 Tenn. 617; *People* v. *Marsh*, 125 Mich. 410.

[4] *In re* Stetler, Fed. Cas. No. 13380; *State* v. *Foley*, 15 Nev. 64; *Hunnicutt* v. *State*, 18 Tex. App. 498; *Easterwood* v. *State*, 34 Tex. Cr. R. 400.

[5] *United States* v. *Wilson*, 32 U.S. 150; *Ex parte* Powell, 73 Ala. 517; *Commonwealth* v. *Halloway*, 44 Pa. 210; *Ex parte* Williams, 149 N.C. 436; *Harlin* v. *McGourin*, 218 U.S. 442; *Carpenter* v. *Lord*, 88 Or. 128; *Burdick* v. *United States*, 236 U.S. 79.

[6] *People* v. *Frost*, 117 N.Y.S. 524.

[7] *Rosson* v. *State*, 23 Tex. App. 287.

[8] *Ex parte* Williams, 149 N.C. 436.

[9] *Ex parte* Reno, 66 Mo. 266.

the pardon. It was here held that in this case sufficient delivery and acceptance had occurred.[1]

A pardon granted by an outgoing president may be revoked by an incoming president before its delivery to the prisoner.[2] In one case a forged letter asking for the pardon of a prisoner was purported to have been sent by the War Department to a state governor. The pardon was granted and placed in the hands of a United States marshal to be served on the prison warden. It was held in this case that such act did not constitute an effective delivery to the prisoner. Usually it is held that delivery of a pardon to a prison warden is a constructive delivery to the prisoner himself, but in this case it was ruled that the circumstances were inconsistent with any intent to grant and deliver a pardon and therefore no delivery had taken place.[3] In a federal case it was held that a pardon signed and sealed by the president and received by the marshal to whom it was directed, but never delivered to the warden of the prison, did not constitute a constructive delivery.[4]

Unless contrary proof is shown the presumption is upheld that a pardon has been accepted.[5] When a convict accepts a conditional pardon it is considered that he accepts freely and voluntarily and not under duress by reason of his imprisonment.[6] When the death penalty is commuted in case of the insanity of the prisoner, such commutation is valid without the acceptance of the convict. His rejection of it after the restoration of his sanity will not have the effect of invalidating it.[7] Likewise a reprieve issued by a governor is effective without the consent or acceptance of the prisoner who is under sentence of death.[8]

REVOCATION FOR FRAUD

It has been often stated by courts that a pardon procured by fraud is void.[9] This has been held even if it is not shown that the prisoner was connected with the perpetration of the fraud.[10] Other courts have ruled that a pardon obtained by fraud can only be declared void "in a proceeding authorized by law, before a court having jurisdiction for the purpose, with ample apportunity to the person holding the pardon to

[1] *Hunnicutt* v. *State*, 18 Tex. App. 498.

[2] *In re* De Puy, Fed. Cas. No. 3814.

[3] *Commonwealth* v. *Halloway*, 44 Pa. 210.

[4] *In re* De Puy, Fed. Cas. No. 3814.

[5] *Ex parte* Powell, 73 Ala. 517.

[6] *In re* Greathouse, Fed. Cas. No. 5741.

[7] *In re* Victor, 31 Ohio St. 206.

[8] *Sterling* v. *Drake*, 29 Ohio St. 457.

[9] *Commonwealth* v. *Halloway*, 44 Pa. 210; *Commonwealth* v. *Kelly*, 9 Phila. 586; *Rosson* v. *State*, 23 Tex. App. 287.

[10] *Commonwealth* v. *Halloway*, 44 Pa. 210.

defend."[1] The mere allegation that a pardon was fraudulently obtained is not sufficient to warrant its revocation. Such facts should only be determined in a judicial hearing.[2] In a case where a pardon was revoked because apparently (prima facie) it was obtained by fraud, affidavits were presented which rebutted this presumption. Under these conditions it was held that the pardon was again in full effect since the presumption of fraud had been removed.[3] It seems to be held generally that a pardon which is not void in its origin nor by reason of fraud and which has been delivered and accepted cannot be revoked.[4]

VALIDITY OF CONTRACT TO PROCURE PARDON

In spite of a general aversion in some states to attorneys interesting themselves in the business of securing pardons, yet it is generally held that the employment of an attorney for such purpose is valid if the service is such only as may properly be performed by an attorney-at-law. The appearance of an attorney under these conditions is not considered as being against public policy.[5] Nor is the engagement of an attorney for such purpose illegal if compensation is contingent on success.[6] But if the use of personal influence is intended then such a contract is usually regarded as being against public policy. A contract to secure signers to a petition soliciting a pardon has been held to be illegal and unenforceable.[7] The execution of a note by a convict to a prosecutrix on condition that she sign a petition for a pardon has been held to be illegal because contrary to public policy.[8] This same view has also been taken by Kansas courts.[9] One who under an illegal contract has paid money to secure a pardon cannot recover such money after the contract has been executed.[10] But it has been held to be otherwise in one state if the contract is unexecuted.[11]

[1] *Knapp* v. *Thomas*, 39 Ohio St. 377. [2] *Ex parte* Rice, 162 S.W. 891.

[3] *Ex parte* Rosson, 24 Tex. App. 226.

[4] *Ex parte* Crump, 135 P. 428; *State* v. *Nichols*, 26 Ark. 74; *Ex parte* Powell, 73 Ala. 517; *Ex parte* Reno, 66 Mo. 266; *Rosson* v. *State*, 23 Tex. App. 287; *Ex parte* Alvarez, 50 Fla. 24.

[5] *Formby* v. *Pryor*, 15 Ga. 258; *Meadow* v. *Bird*, 22 Ga. 246; *Moyer* v. *Cantieny*, 41 Minn. 242; *Chadwick* v. *Knox*, 31 N.H. 226; L.R.A. 1916 D. p. 580.

[6] *Moyer* v. *Cantieny*, 41 Minn. 242.

[7] *Hatzfield* v. *Gulden*, 7 Watts (Pa.) 152.

[8] *Haines* v. *Lewis*, 54 Iowa 301.

[9] *Wm. Deering & Co.* v. *Cunningham*, 63 Kan. 174.

[10] *O'Reilly* v. *Cleary*, 8 Mo. App. 186. [11] *Adams Express Co.* v. *Reno*, 48 Mo. 264.

SOME EFFECTS OF A PARDON

A pardon has been described as:

> An exercise of sovereign clemency toward the guilty, and not of justice toward the innocent. It operates prospectively only, by terminating the penalty and giving the person pardoned a new credit and capacity, but does not entitle the person pardoned to restitution or indemnity.[1]

A pardon which is general in character restores one's full rights and relieves from all disabilities which may have been incurred by reason of his conviction.[2] But where a specific offense is mentioned in a pardon, the pardon is limited to such offense and does not remove a penalty imposed for any other offense.[3] For instance, a pardon for an assault which resulted in the offense of murder being committed because of the death of the assaulted person would not operate as a pardon for murder.[4] An act restoring the rights of citizenship to a convict does not operate as a pardon.[5] Also permission by a mayor to a person to remain in town during good behavior is not a pardon.[6] On the other hand a person may be pardoned for an offense and yet not be restored to citizenship unless the pardon specifically provides for such restoration.[7] Apparently judicial opinion is not entirely agreed as to the effects of a pardon on civil rights, for in a federal decision it is said that a pardon restores to civil rights, to the right to sue, to do military duty, to vote, to hold office, and to the enjoyment of property.[8] But an Illinois decision rules that under a statute providing that every person convicted of larceny shall be considered infamous, and is forever incapable of holding office, voting, etc.; a pardon does not remove these disabilities that are imposed by the statute.[9] There is agreement, however, that an office forfeited for conviction of crime is not restored through the grant of a pardon.[10]

[1] *Cook* v. *Freeholders of Middlesex Co.*, 26 N.J. Law 326.

[2] *State* v. *Foley*, 15 Nev. 64; *Wood* v. *Fitzgerald*, 3 Or. 568.

[3] *Ex parte* Weiner, Fed. Cas. No. 17362; *Hawkins* v. *State*, 1 Port. (Ala.) 475; *State* v. *Creech*, 1 Mo. App. 370; *State* v. *Foley*, 15 Nev. 64.

[4] *Commonwealth* v. *Roby*, 29 Mass. (12 Pick.) 496.

[5] *People* v. *Bowen*, 43 Cal. 39.

[6] *Blanc* v. *Rodgers*, 49 Cal. 15.

[7] *Ex parte* Higgins, 14 Mo. App. 601; *People* v. *Potter*, 1 Edm. Sel. Cas. (N.Y.) 235.

[8] *Hart's Adm'r.* v. *United States*, 15 Ct. Cl. 414.

[9] *Foreman* v. *Baldwin*, 24 Ill. 298.

[10] *Ex parte* Garland, 4 Wall. 333; *Edwards* v. *Commonwealth*, 78 Va. 39; *State* v. *Carson*, 27 Ark. 469; *Commonwealth* v. *Fugate*, 2 Leigh (Va.) 724; *State* v. *Parks*, 122 Tenn. 230.

A person engaged in rebellion is not relieved from civil responsibility for trespass against private individuals, even if he has complied subsequently with the requirements of a general amnesty proclamation.[1] A pardon granted by the federal government to rebels does not permit an attorney to resume his practice of law in the state in which he was admitted before the rebellion unless he first takes a certain oath which all attorneys are required to take according to a state statute.[2] It has also been ruled that a pardon granted to an attorney for forgery does not prevent his professional disbarment.[3]

Regarding the effect of a pardon on the domestic relations it has been held that when a man was pardoned from a life-sentence his rights and duties as a parent were restored. Therefore he had the right to the custody of his infant children, who, during his civil death, have been under the control of a guardian. But the pardon did not annul the second marriage of his wife, nor did it annul the sale of his property by a person appointed to administer his estate. Neither did it devest his heirs of the interest they acquired in his estate because of his civil death.[4] Likewise where a statute gave a wife the right to a divorce upon the conviction of her husband of moral turpitude, this right was not affected by a pardon granted after conviction.[5] A pardon for a first offense does not prevent an enhanced or increased punishment for conviction of a subsequent offense. This view is based on the belief that an enhanced penalty for a subsequent offense is not a new punishment for a prior offense.[6]

RELATION OF PARDON TO COSTS, FINES, FORFEITURES, AND PENALTIES

It has generally been held that when a defendant in a criminal prosecution has been adjudged to pay the costs he is not released from such liability by receiving an unconditional pardon. This view is based on the principle that the right to these costs is a vested right which can in no manner be lessened or cancelled by executive action.[7] And the

[1] *Hedges* v. *Price*, 2 W.Va. 122.

[2] *Ex parte* Hunter, 2 W.Va. 122.

[3] *Nelson* v. *Commonwealth*, 109 S.W. 337.

[4] *In re* Deming, 10 Johns. 232, 483.

[5] *Holloway* v. *Holloway*, 55 S.E. 191.

[6] *Mount* v. *Commonwealth*, 2 Duv. (Ky.) 94; *People* v. *Price*, 53 Hun. 185; *Herndon* v. *Commonwealth*, 105 Ky. 197; *Contra. State* v. *Martin*, 59 Ohio St. 212; *Edwards* v. *Commonwealth*, 78 Va. 39.

[7] *Edwards* v. *State*, 12 Ark. 122; *State* v. *Farley*, 8 Blackf. 229; *Estep* v. *Lacy*, 35 Iowa 419; *In re* Boyd, 34 Kan. 570; *Holliday* v. *People*, 10 Ill. 214; *Cook* v. *Freeholders of Middlesex Co.*, 26 N.J. Law 326; *Cole* v. *State*, 84 Ark. 473; *Ex parte* Mann, 39 Tex. Cr. R. 491; *State* v. *Garrett*, 135 Tenn. 617; *Terrell* v. *State*, 148 P. 822; *Villines* v. *State*, 151 S.W. 1023.

court may remand a pardoned convict to jail until he pays or works out the costs, for such imprisonment is no part of the punishment for which the pardon is granted.[1] But it has been held that a pardon before conviction is a bar to judgment against the defendant for costs and witness fees, whereas when granted after judgment it does not release him from such liability.[2]

A pardon does not have a retroactive effect. It does not indicate nor admit that the judgment of conviction was erroneous, nor that the imprisonment suffered as a result thereof was illegal. Therefore it does not give the recipient of the pardon the right to sue for damages.[3]

It is generally held that a pardon by the executive will release all fines levied.[4] Such action has been upheld even when the fines were due to the county and not to the state.[5] It has also been held that the secretary of the treasury, under law, may in certain cases remit fines and penalties. The practice of granting remission of penalties by other officials than the President has been sanctioned by statute and acquiesced in for over a century and has therefore been recognized as valid by the federal courts.[6]

A fine can be remitted upon the grant of a pardon if it has not become a vested right. It may be remitted after it has been paid to a sheriff if it has not been paid into the county treasury nor charged to the sheriff in auditing his account.[7] But a fine cannot be recovered upon the grant of a pardon after it has been paid to the treasurer of a board of education according to statute.[8] When an informer is entitled to a part of the fine imposed it is a vested right and is not devested by the grant of a pardon.[9]

All rights of property confiscated may be restored by the president of the United States through the issuance of a pardon if such property has not become vested in another through judicial proceedings.[10] But property which had been sold under the confiscation act was not restored by the president's proclamation of amnesty, December 25, 1868.[11] When

[1] *In re* Boyd, 34 Kan. 570; *State* v. *Spellings*, 99 Tenn. 201.

[2] *Duncan* v. *Commonwealth*, 4 Serg. & R. (Pa.) 449; *Commonwealth* v. *Hitchman*, 46 Pa. 357; *White* v. *State*, 42 Miss. 635.

[3] *Roberts* v. *State*, 160 N.Y. 217.

[4] *Commonwealth* v. *Shisler*, 2 Phila. 256; *Parrott* v. *Wilson*, 51 Ga. 255; *Contra. Cook* v. *Freeholders of Middlesex Co.*, 26 N.J. Law 326.

[5] *Cope* v. *Commonwealth*, 28 Pa. 297.

[6] The Laura, 114 U.S. 411.

[7] *Fischel* v. *Mills*, 55 Ark. 344.

[8] *Byrum* v. *Turner*, 87 S.E. 975.

[9] *Rowe* v. *State*, 2 Bay (S.C.) 565; *In re* Flournoy, 1 Ga. 606.

[10] *Osburn* v. *United States*, 91 U.S. 474.

[11] *Wallach* v. *Van Riswick*, 92 U.S. 202.

the proceeds of such sale had been paid into the treasury of the United States they were regarded as having become vested in the United States.[1] It has been held in some federal cases that a pardon granted by the president has the effect of remitting the whole penalty even when an informer was entitled by law to a moiety of the judgment.[2]

CONDITIONAL PARDON

It is generally agreed that the pardoning authority may grant conditional pardons as well as absolute pardons. In a conditional pardon the conditions annexed are either precedent or subsequent. If the grantee does not perform the conditions precedent the pardon does not take effect; if he does not perform the conditions subsequent the pardon becomes null. Consequently if the conditions are not performed the original sentence remains in full force.[3] It has been said that when a conditional pardon is granted the conditions, to be operative, should appear on the face of the pardon.[4] The conditions attached to a pardon must not be immoral, illegal, or impossible.[5] One court has said that where the conditions are of this character the pardon becomes absolute.[6] When a conditional pardon is accepted by a convict it is a contract between him and the state according to this same state court.[7]

Any punishment recognized by the common law or statute as enforced in a state may be annexed as a condition to a pardon with the consent of the prisoner.[8] One condition often attached has been that the prisoner shall leave the state.[9] One court has ruled that if a prisoner complies with such a condition but afterward returns to the state, he is not liable to be reimprisoned if the conditional pardon does not forbid his return.[10] The expediency of granting a conditional pardon on condition that the

[1] *Knote* v. *United States*, 95 U.S. 149.

[2] *United States* v. *Thomasson*, Fed. Cas. No. 16479; *Contra. United States* v. *Lancaster*, Fed. Cas. No. 15557.

[3] *In re* Flavell, 8 Watts & Sergeant (Pa.) 197; *Ex parte* Alvarez, 50 Fla. 24.

[4] *Ex parte* Reno, 66 Mo. 266.

[5] *Lee* v. *Murphy*, 22 Grat. 789; *State* v. *Barnes*, 32 S.C. 14; *People* v. *Marsh*, 125 Mich. 410.

[6] *People* v. *Potter*, 1 Edm. Sel. Cas. (N.Y.) 235.

[7] *People* v. *Potter*, 1 Edm. Sel. Cas. 235. [8] *Lee* v. *Murphy*, 22 Grat. 789.

[9] *Ex parte* Lockhart, 1 Disn. (Ohio) 105; *Commonwealth* v. *Haggerty*, 4 Brewst. (Pa.) 326; *State* v. *Smith*, Bailey (S.C.) 283; *State* v. *Barnes*, 32 S.C. 14; *Contra. Commonwealth* v. *Hatsfield*, 1 Clark (Pa.) 177; *Commonwealth* v. *Fowler*, 4 Call. (Va.) 35.

[10] *Ex parte* Hunt, 10 Ark. 284.

recipient forever leave the state may be open to question, especially if he be a native of the state. Each state should face its own criminal problem. Ridding itself of its criminal element in this manner involves, probably, a violation of state comity.

Other conditions attached to pardons have also been upheld. A condition in one pardon that the person receiving it should claim neither his property nor the proceeds thereof that had been sold under the confiscation laws of the United States by decree of court was held to preclude his recovery of the same.[1] A pardon granted on condition of payment of a fixed sum of money to a county has been held to be valid.[2] A pardon granted on condition that the grantee shall wholly abstain from the use of intoxicating liquors for five years was upheld as valid.[3] But when a convict was pardoned upon the condition that he would refrain from the use of such liquor it was held not to be a breach of his pardon if he used liquor after the expiration of the time for which he was sentenced.[4] In Oregon conditional pardons are always granted on condition that the person receiving the same shall be and remain a law-abiding citizen. A pardon of this character has been held valid and proper.[5]

There should be a strict compliance with the terms of a conditional pardon by one who claims its benefits. The proof that such conditions have been fully performed should be clearly shown.[6] Such conditions must be performed before the pardon is of any effect. A condition in a pardon that an oath was to be taken after its grant was not fulfilled by showing that a similar oath had been taken before its issue.[7] A pardon from sentence of imprisonment on condition of paying a fine and costs is of no effect until such fine and costs are paid.[8] Likewise a pardon conditioned on payment of costs and perpetual abstinence from engaging in the saloon business is void unless compliance is made with the conditions.[9] A pardon has generally been held void if a person

[1] *United States* v. *Six Lots of Ground*, Fed. Cas. No. 16299.

[2] *People* v. *Marsh*, 125 Mich. 410.

[3] *People* v. *Burns*, 77 Hun. (N.Y.) 92.

[4] *Huff* v. *Dyer*, 4 Ohio Cir. Ct. R. 595.

[5] *Ex parte* Houghton, 89 P. 801.

[6] *Haym* v. *United States*, 7 Ct. Cl. 443; *Waring* v. *United States*, 7 Ct. Cl. 501; *Scott* v. *United States*, 8 Ct. Cl. 457.

[7] *Haym* v. *United States*, 7 Ct. Cl. 443.

[8] *In re* Ruhl, Fed. Cas. No. 12124.

[9] *McKay* v. *Woodruff*, 77 Iowa 413.

who accepts it on condition that he leave the state or United States is again found in such state or country.[1]

When a prisoner has been released on a conditional pardon the time he has been at liberty is not counted as time served on his sentence if he is recommitted to serve the remainder of the sentence because of violation of the terms of the pardon.[2]

A conditional pardon is of the same effect as if its terms were absolute when a convict has fulfilled all the conditions annexed thereto.[3] In one case a person received a pardon for the sole purpose of restoring his citizenship. It was granted after he had served his full term and on condition that it might be revoked if he violated any criminal laws of the state. The condition in the pardon was held to be void for the reason that the state constitution provided that no one could be deprived of his citizenship as it related to his right to hold office, sit upon juries, testify in court, and exercise the franchise except upon the conviction of a felony.[4] But when a pardon has been issued to one convicted of defrauding the United States government of public lands upon condition that he make reparation to the satisfaction of the United States district attorney, such pardon does not enable this official to pledge the government to compensate the grantee for the improvements made and the taxes paid on such property.[5]

It has been held that a judicial determination was unnecessary to recommit a prisoner who had been granted a pardon on the condition that if he violated its terms he was liable to summary arrest and reimprisonment, and that the governor's judgment should be conclusive as to whether the conditions of the pardon had been violated.[6] When a statute provides for recommitment under similar conditions, such a law has also been held valid.[7] But these forms of action do not furnish the exclusive means for determining whether there has been a breach of the pardon contract. Such contract may be annulled by any court of

[1] *People* v. *Potter*, 1 Parker Cr. R. 47; *Ex parte* Lockhart, 1 Disn. (Ohio) 105; *State* v. *Fuller*, 1 McCord (S.C.) 178; *State* v. *Smith*, 1 Bailey (S.C.) 283; *State* v. *Addington*, 2 Bailey 516.

[2] *People* v. *Hayes*, 118 N.Y.S. 42; *Ex parte* McKenna, 79 Vt. 34; *State* v. *Barnes*, 32 S.C. 14; *Contra. Ex parte* Prout, 12 Idaho 494.

[3] *Ex parte* Alvarez, 50 Fla. 24.

[4] *Taylor* v. *State*, 41 Tex. Cr. R. 148.

[5] *Bradford* v. *United States*, 228 U.S. 446.

[6] *Ex parte* Houghton, 89 P. 801; *Arthur* v. *Craig*, 48 Iowa 264.

[7] *In re* Kennedy, 135 Mass. 48.

competent jurisdiction after it has investigated the alleged violations of the conditions of the pardon.[1]

But unless recommitment is provided for, either by statute or by the terms of the pardon, a person cannot, it is held, be recommitted by order of a governor or pardon board without a judicial hearing where he may show either that he is not the same person who was convicted and pardoned, or that he has performed the conditions annexed to the pardon, or that he has a proper legal cause for not having lived up to the conditions imposed.[2] If the prisoner denies that he is the person who was pardoned he is entitled to a jury trial to determine such issue.[3] A difference of opinion exists as to whether a jury trial may be demanded for the determination of other facts and issues connected with recommitment.[4]

Unless the method of determining whether there has been a violation of a pardon has been definitely prescribed by statute the ordinary practice is for some court of general criminal jurisdiction, when its attention is called to an alleged violation,

> to issue a rule reciting the conviction and sentence, the pardon and its conditions, and the alleged violation, and requiring the sheriff to arrest the convict and serve a copy of the rules on him, ... and if the facts are found for the convict he should be discharged; otherwise he should be remanded to custody and ordered to have the original sentence imposed upon him duly executed.[5]

From the foregoing summary of the legal aspects of the pardoning power it is evident that a body of precedent has been well established for the judicial dealing with clemency. This is quite in contrast with the irregular methods that prevail with the administrative features of this problem.

[1] *Henderson* v. *State*, 46 So. 151.

[2] *People* v. *Moore*, 62 Mich. 497; *State* v. *Wolfer*, 53 Minn. 135; *Ex parte* Alvarez, 50 Fla. 24; *State* v. *Horne*, 42 So. 388.

[3] *State* v. Horne, 42 So. 388.

[4] *Ex parte* Alvarez, 50 Fla. 24; *State* v. *Horne*, 42 So. 388; *State* v. *Chancellor*, 1 Strob. (S.C.) 347; *Contra*. *People* v. *Burns*, 77 Hun. (N.Y.) 92.

[5] *Ex parte* Alvarez, 50 Fla. 24.

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